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IN THE

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Supreme Court of the United States

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, William C. Witherspoon, petitioner-appellant in the court below, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this case.

Opinion Below

The opinion of the Supreme Court of Illinois, reported at 36 Ill. 2d 471, 224 N.E. 2d 259 (1967), is appended hereto as Appendix A.

Jurisdiction

The opinion and judgment of the Supreme Court of Illinois was entered on January 19, 1967. A petition for rehearing was denied on March 27, 1967, and the judgment became final on that date. Mr. Justice Abe Fortas has extended the time for filing this petition to July 11, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. An Illinois statute provided that the State could challenge for cause all prospective jurors who were opposed to or had conscientious scruples against capital punishment. (Ch. 38, § 743, Ill. Rev. Stat. 1959.)

The question presented is whether the courts below should have afforded petitioner an opportunity to prove the allegations of his petition that the operation of this statute deprived him of a jury which fairly represented a cross section of the community, and assured the State of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

2. When petitioner was tried in 1960, an Illinois statute (Ch. 38, § 801, Ill. Rev. Stat. 1959) provided that if a defendant indicted for murder (and several other "major" crimes) exercised his right to trial by jury, the jury fixed the punishment in the event the defendant was found guilty; the defendant was *not* afforded an opportunity to introduce evidence in mitigation before his punishment was fixed. If however, the defendant waived jury trial and was found guilty by the trial judge, the defendant *was* permitted to

introduce evidence in mitigation before sentence was imposed.

The question presented is whether Illinois can penalize a certain class of criminal defendants for exercising their right to trial by jury, by preventing them from introducing mitigating evidence before sentence is imposed. Or is this statutory system violative of the rights of those defendants under the Sixth and Fourteenth Amendments to the United States Constitution?

3. In the trial court, petitioner offered to prove that he has become rehabilitated since the time of his trial (1960), that capital punishment has no deterrent effect on potential murderers who do not kill for hire, and that imposition of the death penalty on petitioner at this time is repugnant to current concepts of humane justice and is therefore cruel and unusual punishment in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

The question presented is whether the courts below erred in refusing to permit petitioner to prove these allegations?

4. Were petitioner's rights under the Fourteenth Amendment to the United States Constitution violated when, in a pre-trial hearing on the admissibility of petitioner's confession, the trial judge refused to permit petitioner's counsel to ask the Assistant State's Attorney who obtained the confession whether he advised petitioner of his constitutional rights and that he had a right to talk to a lawyer before making a statement?

5. Did the courts below err in refusing to permit petitioner to prove the allegations of his petition that he has discovered a witness who can support petitioner's claim that petitioner's confession was obtained by means of physical coercion?

6. In view of the pre-trial petition filed by petitioner's counsel that they could not secure full cooperation from petitioner, were petitioner's rights under the Fourteenth Amendment violated by the trial court's failure to hold a hearing to determine whether petitioner was competent to stand trial?

7. An Illinois statute provided that if a defendant testified in his own behalf, the State could prove in rebuttal that the defendant had been convicted of "infamous crimes" (Ch. 38, § 734, Ill. Rev. Stat. 1959). Following petitioner's testimony, the State was permitted to prove that he had been convicted of a crime 11 years before.

The question presented is whether this statute imposed a penalty upon petitioner's right to testify on his own behalf, in violation of his rights under the Fourteenth Amendment to the United States Constitution?

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury of the State . . . wherein the crime shall have been committed. . . ."

The Eighth Amendment to the United States Constitution provides in pertinent part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 360 of the Illinois Criminal Code (Ch. 38, § 360, Ill. Rev. Stat. 1959) provided:

> "Whoever is guilty of murder shall suffer the punishment of death or imprisonment in the penitentiary for his natural life or for a term not less than 14 years. If the accused is found guilty by a jury they shall fix the punishment by their verdict."

Section 734 of the Illinois Criminal Code (Ch. 38, § 734, Ill. Rev. Stat. 1959) provided in part:

> "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; . . ."

Section 743 of the Illinois Criminal Code (Ch. 38, § 743, Ill. Rev. Stat. 1959) provided:

> "In trials for murder it shall be a cause for challenge of any juror, who shall on being examined state that he has conscientious scruples against capital punishment or that he is opposed to the same."

Section 801 of the Illinois Criminal Code (Ch. 38, § 801, Ill. Rev. Stat. 1959) provided in pertinent part:

> "In all cases where any person . . . shall be charged with murder . . . and the case shall be tried by a jury and the jury shall find the defendant guilty, the jury shall also by its verdict fix the punishment . . . In all cases tried by the court without a jury, on a plea of not guilty or on a plea of guilty, for the purpose of determining the duration of imprisonment the court may, after conviction of the person, consider the evidence, if any, received upon the trial, and any other evidence offered as to aggravation and mitigation of the offense, and may also hear and receive evidence as to the moral character, life, family, occupation, and criminal record, if any, of such person so convicted."

STATEMENT

Petitioner's Arrest, Trial and Conviction

Chicago police officer Mitchell Stone was shot and killed on April 29, 1959. Petitioner Witherspoon was taken into custody several hours later. (A. 21.)* During a lengthy interrogation at police headquarters, the police failed to apprise petitioner of his right to remain silent, and rejected his request to speak with an attorney. Eventually petitioner admitted that he had shot officer Stone. (R. 164-172.)

After petitioner was indicted, he advised the trial court that he was indigent and counsel was appointed to represent him. Petitioner's counsel filed a motion requesting that petitioner be examined psychiatrically because counsel were unable to secure petitioner's full cooperation. The trial court ordered an examination of petitioner by the Cook County Behavior Clinic in order to obtain an opinion as to his competency to stand trial. (R. 57.) However, no hearing on this issue was held by the Court.

Prior to trial, petitioner moved to suppress his confession on the ground that it was obtained through mental and physical coercion. (R. 27.) During the course of the hearing on the motion, petitioner's counsel attempted to prove that the police did not advise petitioner of his right to remain silent and to consult with a lawyer, but the trial court sustained objections to this line of inquiry, apparently on the ground that these subjects were irrelevant. (R. 353, 361.) The motion to suppress the confession was denied. (R. 613.)

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* "R." refers to the transcript of petitioner's trial, found in Volumes I, II and III. "A." refers to the printed abstract filed in the Illinois Supreme Court on petitioner's original appeal. "Abst." refers to the printed abstract filed in the Illinois Supreme Court in the instant case, found in Volume IV, p. 306.

Under Illinois law at the time petitioner was tried, a defendant who was found guilty of a crime had the right to introduce evidence in mitigation before being sentenced by the trial judge. The Illinois Criminal Code provided, however, that in cases involving a charge of murder and several other "major" crimes, the jury fixed the penalty. (Ch. 38, § 801, Ill. Rev. Stat. 1959.) Accordingly, defendants such as petitioner who exercised their right to jury trial were required to forego their right to introduce mitigating evidence in the event of a guilty verdict.

Another Illinois statute which was in force at the time of petitioner's trial authorized the State to excuse for cause all prospective jurors who admitted that they had conscientious scruples against the imposition of the death penalty. (Ch. 38, § 743, Ill. Rev. Stat. 1959.) Nearly fifty percent of the jurors questioned were excused for cause on this ground. (R. 636-1018.)

During the trial, petitioner's confession and admissions were introduced into evidence over defense objections. (A. 43-44.) Petitioner testified that he had shot officer Stone accidentally. (A. 126-127.)

On April 22, 1960 the jury returned its verdict finding petitioner guilty of murder and fixing his punishment at death. (A. 220.) Petitioner was never afforded an opportunity of introducing mitigating evidence with respect to the penalty to be imposed on him.

Petitioner's Direct Appeal

After petitioner's conviction, his court-appointed counsel was granted leave to withdraw, and the Supreme Court of Illinois appointed new counsel to represent him on appeal. Petitioner's new counsel argued in the Supreme Court of Illinois that the trial court had committed prejudicial error

in admitting evidence of prior crimes, and that the trial court's conduct and comments throughout the trial indicated prejudice and constituted reversible error. Without consultation with petitioner, however, the constitutional issues which had been raised at trial and many of the trial errors were not tendered or urged by appellate counsel. The Illinois Supreme Court held that at least one of the rulings attacked on appeal was error, but that the error was not prejudicial. The Supreme Court affirmed the conviction on March 3, 1963, and rehearing was denied on May 22, 1963. *People* v. *Witherspoon,* 27 Ill. 2d 483 (1963).

Counsel who had been appointed for petitioner in the Illinois Supreme Court withdrew and declined to represent petitioner further. Petitioner then applied to this Court for appointment of counsel to prepare a petition for writ of certiorari, but he was advised that this Court did not appoint counsel on such petitions. Eventually, on September 11, 1963 the Supreme Court of Illinois appointed new counsel, but by then it was too late to apply for certiorari to this Court. (Abst. 13.)

Petitioner's Prior Collateral Attacks on the Conviction

On October 9, 1963, petitioner's third appointed counsel filed a petition for writ of habeas corpus in the United States District Court. The court denied the petition without prejudice on the ground that petitioner had not exhausted his state court remedies.

Petitioner thereupon filed two actions in the state courts, (i) a motion for leave to file an original petition for writ of habeas corpus in the Supreme Court of Illinois (denied on November 15, 1963) and (ii) a petition in the trial court under the Illinois Post-Conviction Hearing Act (Ch.

8, §§ 826-832, Ill. Rev. Stat. 1963). The latter petition as dismissed by the trial court on the ground that the oints raised in the petition were raised or could have een raised in the original appeal to the Supreme Court f Illinois and were therefore barred by the doctrines of *es judicata* or waiver. A petition for writ of error was enied by the Supreme Court of Illinois in an unreported pinion, the Court holding that the post conviction peti- on was barred by *res judicata* and waiver as the trial ourt had ruled. *People* v. *Witherspoon*, Ill. Sup. Ct. No. 559 (Jan. 17, 1964).

Thereafter, petitioner's previously dismissed petition for rit of habeas corpus in the federal District Court was einstated, and an amended petition was filed. No hearing as held but briefs were received concerning two legal sues, namely (1) whether the trial court had erroneously structed the jury as to the admissibility of petitioner's onfession, and (2) whether Section 801 of the Illinois riminal Code violates the United States Constitution by ermitting the jury to fix the penalty in murder cases, thus epriving convicted defendants of the right to present evi- ence in mitigation. The District Court ruled that the ial judge had properly instructed the jury as to peti- oner's confession, but that the procedure by which the ry fixed the penalty was unconstitutional. The District ourt ordered the sentence of death vacated and petitioner turned to the Criminal Court of Cook County to be ven an opportunity to introduce evidence in mitigation efore sentence was re-imposed. Both parties appealed. he United States Court of Appeals for the Seventh Cir- it affirmed the District Court ruling as to the confession, t reversed the ruling that Section 801 of the Illinois riminal Code was unconstitutional and remanded the

cause with directions to dismiss the petition for writ of habeas corpus. *United States ex rel. Witherspoon* v. *Ogilvie,* 337 F. 2d 427 (7th Cir. 1964). This Court denied certiorari. 379 U.S. 950.

Petitioner then filed another petition for writ of habeas corpus in the federal District Court. New counsel were appointed to represent him. In February, 1965 the District Court entered an order staying further proceeding until petitioner had exhausted all available remedies in the Illinois courts.

Present Proceedings

Petitioner then filed a new petition in the state court. The allegations of the petition are discussed under the appropriate subheadings of the "Reasons for Granting the Writ." The State took issue with many of the factual averments of the petition. (A. 19-50.) The State moved to strike the petition on the grounds of *res judicata,* waiver and lack of subject matter jurisdiction. Petitioner filed a reply in which he requested an opportunity to adduce proof in support of the contested portions of his pleadings. (A. 50-60.) The trial court denied petitioner's request to introduce evidence in support of his pleadings, and dismissed the petition, as amended, on the ground that the facts set forth in the petition, taken as true, were insufficient to warrant the relief requested because (a) some of the issues presented had been ruled upon previously in earlier proceedings and were *res judicata,* and (b) the issues not previously raised failed to constitute a substantial deprivation of Witherspoon's constitutional rights. (A. 60, 62-64, 69.)

The Supreme Court of Illinois affirmed the trial court's dismissal of the petition. Rehearing was denied March 27, 1967. A copy of the Court's opinion is reproduced as Appendix A.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS A NOVEL AND SUBSTANTIAL QUESTION AS TO DISQUALIFICATION FOR CAUSE OF VENIREMEN HAVING SCRUPLES AGAINST IMPOSITION OF THE DEATH PENALTY.

At the time of petitioner's trial, an Illinois statute provided that the State could challenge for cause any prospective juror who "has conscientious scruples against capital punishment, or . . . is opposed to the same." (Ch. 38, § 743, Ill. Rev. Stat. 1959.) This statute resulted in the disqualification of almost 50% of the veniremen at petitioner's trial.

Petitioner attacked this statute on the ground that it violates the Due Process Clause, in that (1) it excluded for cause a substantial segment of the community and thus deprived him of his right to be tried by a jury which is fairly representative of the entire community, and (2) it deprived him of a fair jury because persons who lack scruples against imposition of the death penalty are "prosecution prone" on the issue of guilt or innocence.*

Petitioner also attacked this statute on the ground that it violates the Equal Protection Clause, in that it singles out for unequal and inferior treatment—trial by a non-representative, prosecution prone jury—defendants accused of certain crimes, and then only if the state decides to qualify the jury for imposition of the death penalty. This is an arbitrary and capricious distinction having no basis in reason.

* Petitioner offered to prove this by expert testimony.

Challenge for cause of jurors having scruples against the death penalty originated in cases in which the death penalty was mandatory. See, *e.g.*, *U. S.* v. *Cornell*, 25 Fed. Cas. 650, 655-6, 2 Mason 91 (1819). But the reason for this rule does not exist when the death penalty is not required. By permitting the State to challenge for cause on the basis of scruples against capital punishment, Illinois guarantees a prosecution-oriented jury, whose views fail to reflect a large and important portion of the community.

We realize that three federal Courts of Appeal* concur with the Illinois Supreme Court that the Illinois statute is valid. However, the reasoning of these cases depends upon the proposition that the elimination of jurors who oppose the death penalty does *not* create a "prosecution prone" jury. In the instant case, petitioner offered to prove, by competent scientific evidence that death qualified jurors *are* partial to the prosecution on the issue of guilt or innocence. Numerous studies made in recent years support these allegations.* Assuming, as the Court must on this record, that the application of Section 743 of the Illinois Criminal Code did in fact result in petitioner being

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* *U. S.* v. *Puff*, 211 F.2d 171 (2d Cir. 1954); *Turberville* v. *U. S.*, 303 F.2d 411 (D.C. Cir. 1962); *Pope* v. *U. S.*, 372 F.2d 710 (8th Cir. 1967); see also *U. S. ex rel. Dukes* v. *Sain*, 297 F.2d 799 (7th Cir. 1962), cert. denied 369 U.S. 868.

* Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt," 39 Tex. L. Rev. 545 (1961); Wilson, "Belief in Capital Punishment and Jury Performance," The Texas Observer, Nov. 27, 1964, p. 5; Zeisel, "Some Insights Into the Operation of Criminal Juries," (1957); Crosson, "An Investigation Into Certain Personality Variables Among Capital Trial Jurors" (Doctoral Dissertation, Western Reserve University, 1966).

tried by a prosecution prone jury, it is clear that his rights under the Sixth and Fourteenth Amendments were violated.

Petitioner is entitled under the Sixth Amendment, through the Fourteenth, to be tried by "an impartial jury of the State, . . . wherein the crime shall have been committed." *Parker* v. *Gladden*, 87 S.Ct. 468, 470 (1966).

In *Fay* v. *New York*, 332 U.S. 261, 285-6 (1947), this Court observed that a jury "organized to convict" is subject to constitutional challenge. Petitioner was not permitted to establish that the jury which tried him was "organized to convict."

The Illinois courts erred in refusing to afford petitioner the opportunity to prove the allegations of his post-conviction petition by competent evidence. This Court has never ruled on this novel and substantial federal question as to the widespread practice of challenging for cause veniremen who have scruples concerning the death penalty.

II.

THIS CASE PRESENTS A NOVEL QUESTION AS TO THE VALIDITY OF AN ILLINOIS STATUTE WHICH PENALIZED PETITIONER FOR EXERCISING HIS RIGHT TO TRIAL BY JURY.

When petitioner was tried, Illinois law provided that if a defendant indicted for murder waived trial by jury and was thereafter found guilty, he was entitled to introduce evidence in mitigation before being sentenced by the trial judge; but if the defendant exercised his right to jury trial and was found guilty, the jury also fixed the punishment. (Ch. 38, § 801, Ill. Rev. Stat. 1959.)

Thus, the defendant was required to forego the opportunity to introduce mitigating evidence as the price of a jury trial.*

Due process of law includes an opportunity to introduce evidence on all issues to be determined. *In Re Oliver,* 333 U.S. 257, 273 (1948). One of the most important issues in a criminal trial is the fixing of punishment. The sentencing stage of a criminal trial must meet the standards of the Due Process Clause. *Townsend* v. *Burke,* 334 U.S. 736, 741 (1948). Yet, under the statute here involved, the defendant is prohibited from adducing evidence relevant to the sentence to be imposed solely because he exercised his right to trial by jury.

Petitioner's right to jury trial emanates from the United States Constitution. *Parker* v. *Gladden,* 87 S.Ct. 468, 470 (1966). In *Griffin* v. *California,* 380 U.S. 609 (1965), this Court struck down the practice of the prosecutor commenting on defendant's failure to testify because, ". . . it is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly . . ." (380 U.S. at 614.) So too, deprivation of an opportunity to introduce mitigating evidence is a penalty for exercising a constitutional privilege, and seriously detracts from the privilege.

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* While the defendant may theoretically introduce some mitigating evidence before the jury during the trial, the Illinois Supreme Court has recognized that the kind and nature of the evidence which would be so introduced is extremely limited as compared to that which is available at a separate hearing. *People* v. *Spann,* 20 Ill. 2d 338, 343 (1960). Moreover, there is a substantial inconsistency between evidence in mitigation and the assertion of innocence, so that the defendant who pleads not guilty can not, as a practical matter, adduce any significant evidence in mitigation.

Closely analogous is *U. S.* v. *Jackson*, 262 F. Supp. 716 (D. Conn. 1967), in which the court held unconstitutional a portion of 18 U.S.C. § 1201(a) because the statute provides for imposition of the death penalty only upon a jury recommendation (262 F. Supp. at 717-18):

> "If defendants claim their fundamental Sixth Amendment right to trial by jury, therefore, they must risk their lives. That risk is at least substantially reduced if defendants waive their constitutional right to jury trial by claiming trial to the court or by pleading guilty. . . . If defendants waive jury trial or plead guilty, therefore, they may thus gain immunity from capital punishment; if they assert their constitutional right to jury trial, however, the price for assertion of such constitutional right is the risk of death.
>
> "The Supreme Court of the United States recently reversed a state conviction of a capital offense because comment on the failure of the accused to testify had penalized and made costly the assertion of the Fifth Amendment right to silence. Assertion of the equally fundamental right to trial by jury is made no less costly for these defendants by the very terms of the statute which defines the offense with which they are charged.
>
> "This Court therefore holds that 18 U.S.C. §1201(a), to the extent that it impairs defendants' free exercise of their right to trial by jury, violates the Sixth Amendment to the Constitution of the United States and is invalid."

So too in Illinois, defendants were restrained in exercising their right to jury trial because they thereby forfeited the opportunity to introduce mitigating evidence in the event they were found guilty.

The issue raised by this branch of the case has never been addressed by this Court. In *Frady* v. *U. S.*, 348 F.2d 84 (D.C. Cir. 1965), it was said (348 F.2d at 98, concurring opinion):

> " . . . Serious questions of constitutionality under the due process clause would surely arise from any attempt, limited to capital cases, to deprive a defendant of the opportunity to inform the court or the jury with respect to its sentencing function."

We respectfully submit that this Court should grant the petition and thereafter determine the merits of this important federal question.

III.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER IMPOSITION OF THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.

In the trial court, petitioner alleged and offered to prove the following allegations (Abst. 6-9):

(1) Petitioner has been substantially rehabilitated, and is psychologically and morally a different person from the defendant who was sentenced to death in 1960.

(2) Modern scientific knowledge in the fields of psychology, sociology and criminology demonstrate that capital punishment has no deterrent effect or other redeeming social benefit, and fails to fulfill any of the legally acceptable purposes of punishment.

(3) The penalty of death is disproportionately cruel punishment for the crime of murder, when not committed for hire or other direct economic gain, and has no deterrent effect on murders not for hire or other direct economic benefit.

(4) Under these circumstances, imposition of the death penalty upon the petitioner is repugnant to current concepts of humane justice and constitutes cruel and unusual punishment in violation of petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

Although the State's motion to dismiss admitted these allegations, the trial court dismissed the petition without hearing.

Petitioner contends that he should be afforded an opportunity to adduce proof in support of his claims.*

If petitioner is able to establish the allegations set forth above, we submit that executing him would run afoul of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

The concept of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States,* 217 U.S. 349, 378 (1910). Likewise, the Due Process Clause "is not confined within a permanent catalogue of what may at a given time be deemed the limit or the essentials of fundamental rights . . . " *Wolf* v. *Colorado,* 338 U.S. 25, 27 (1949).

One of the major factors which contributes to the evolution of constitutional standards is the development of scientific knowledge and understanding. The importance of advanced scientific evidence in solving constitutional questions was recognized, for example, in *Brown* v. *Board of Education,* 347 U.S. 483, 499 (1954) (psychological evidence of effect of school segregation on Negro children), and in *Robinson* v. *California,* 370 U.S. 660 (1962) (medical aspects of drug addiction considered under the Cruel and Unusual Punishment Clause).

This Court has recognized that "deterrence and reformation" are the proper objectives of punishment, rather than "retaliation and vengeance." *Morrissette* v. *U.S.*, 342 U.S. 246, 251 (1952); see also *Williams* v. *New York,*

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* Although this contention was fully presented in the trial court and briefed on appeal, no mention is made of it in the opinion of the Illinois Supreme Court.

337 U.S. 241, 248 (1949); *Trop* v. *Dulles*, 356 U.S. 86, 111 (1958) (concurring opinion of Mr. Justice Brennan). Execution of a rehabilitated defendant, particularly where no deterrence is achieved, shocks the conscience and violates fundamental notions of decency.

The petition also alleges (and the allegations stand admitted) that petitioner has been frequently subjected to severe psychological torture by the repeated settings and postponements of the date of his execution, including several last minute reprieves. These allegations pose the question of whether the State action in repeatedly fixing specific dates for execution during the pendency of the condemned defendant's litigation constitutes cruel and unuusal punishment in violation of the Eighth Amendment to the United States Constitution. Compare *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947).

In *Rudolph* v. *Alabama*, 375 U.S. 889 (1963) three Justices of this Court felt that the court should consider a substantially identical issue without the aid of scientific evidence. Here petitioner does not seek to have these important legal and social issues decided in an evidentiary vacuum; he seeks only the opportunity to adduce the relevant evidence so that these issues may properly be considered.

The courts below should have afforded petitioner an opportunity to establish the factual allegations set forth above upon which he predicates his attack upon imposition of the death penalty at this time.

The issue tendered, which the Illinois Supreme Court chose to overlook, presents a most serious and unique constitutional issue.

IV.

THIS CASE PRESENTS THE QUESTION OF WHETHER PETITIONER WAS ERRONEOUSLY PREVENTED FROM ESTABLISHING THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED IN CONNECTION WITH HIS CONFESSION.

In the pre-trial hearing respecting the admissibility of petitioner's confession, the trial judge sustained the State's objections to the following questions put to the Assistant State's Attorney who took the confession (R. 353, 361):

> "Q. Did you, in this case, sir, advise the defendant of his constitutional rights?
>
> * * *
>
> "Q. Did you tell the defendant he had a right to talk to a lawyer before taking a statement?"

The Illinois Supreme Court approved these rulings on the ground that petitioner's trial preceded this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This was a clearly erroneous ruling. In *Davis* v. *North Carolina*, 384 U.S. 737, 740-1 (1966), this Court said:

> "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by those decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made . . . "

In ruling that petitioner's confession was admissible, the trial judge excluded relevant evidence. This case presents the important issue of what remedy should be afforded defendants in pre-*Miranda* cases whose confessions were admitted under an erroneous standard like that used in petitioner's case.

V.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER ILLINOIS IS REQUIRED TO GRANT PETITIONER A HEARING RESPECTING NEWLY DISCOVERED EVIDENCE AS TO THE VOLUNTARINESS OF HIS CONFESSION.

Petitioner's verified petition alleges that, subsequent to the time of his trial and conviction, "petitioner has discovered the existence of additional evidence to support his contention that his confession and admissions were not voluntary, but rather were the result of a physical and mental coercion brought to bear on petitioner by the police," to wit, "a witness who observed petitioner when he was in the police station, and who can testify to petitioner's physical condition at that time." (Abst. 10.) Petitioner requested a new hearing on the issue of voluntariness of his confession, or in the alternative an opportunity to present the testimony of the witness so that the trial court could determine whether or not the testimony of that witness would justify a complete rehearing on the voluntariness of his confession. The trial court dismissed the petition, and the Supreme Court of Illinois affirmed on the grounds that *new trials* will be granted on the ground of newly discovered evidence only if it appears that the evidence is of such conclusive character that it will probably change the result, and that "the allegations of newly discovered evidence tell nothing about the evidence, and do not suggest that it will be 'conclusive and not merely cumulative' or that 'it will probably change the result if a new trial is granted.'" (Appendix A, pp. 6-7.) Thus, petitioner was denied the opportunity to present the new evidence so that its significance could be realistically appraised.

The issue presented here is whether the Due Process Clause requires the states to provide convicted defendants a hearing respecting substantial claims of violation of their federal constitutional rights.* Mr. Justice Brennan suggests in *Case* v. *Nebraska,* 381 U.S. 336, 344-47 (1965), that the sharp increase in the number of federal habeas corpus petitions and the resulting friction between state and federal courts can be ameliorated only by a forthright holding that the state must provide a collateral remedy which allows the prisoner a full and fair factual hearing on his constitutional claims. See also *Henry* v. *Mississippi,* 379 U.S. 443, 452-453 (1965). Good sense, and the Due Process Clause, require nothing less.

This important question should be resolved by this Court.

VI.

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S FAILURE TO HOLD A HEARING TO DETERMINE HIS COMPETENCY TO STAND TRIAL.

Prior to trial, petitioner's counsel filed a petition seeking to have petitioner examined by the Cook County Behavior Clinic "for the reason that [petitioner's] at-

* The test as to whether a federal district court must grant such a hearing to a state-convicted petitioner is set forth in *Townsend* v. *Sain,* 372 U.S. 293, 312-18 (1963). See also 28 U.S.C. § 2254.

torneys have been unable to secure the full cooperation of [petitioner].'"* (R. 57.)

Despite the allegation that petitioner was unable to cooperate with counsel, the trial court failed to conduct a hearing to determine his competency to stand trial.

One who is mentally incapable of cooperating with counsel is incompetent to stand trial, and the law is settled that the conviction of an accused person while he is legally incompetent violates due process. *Pate* v. *Robinson,* 383 U.S. 375, 378 (1966).

Under Illinois law, the issue of competency to stand trial is determined by a jury. The trial judge has no discretion to decide the issue himself. If a *bona fide* question of the defendant's competency to stand trial is raised, the trial judge must empanel a jury to decide the issue at the request of either party, or, if no specific request is made, *sua sponte*. *People* v. *Burson,* 11 Ill.2d 360, 368, 370 (1957); *Brown* v. *People,* 8 Ill.2d 540, 545 (1956). The Due Process Clause requires Illinois trial court judges to grant such a hearing "[W]here the evidence raises a '*bona fide* doubt' as to a defendant's competence to stand trial . . ." *Pate* v. *Robinson,* 383 U.S. 375, 385-86 (1966).

---

* A Behavior Clinic examination was apparently had, but there is a dispute as to whether it was transmitted to the trial court or filed with the Clerk. During the hearings on the present post-conviction petition, counsel for the State sought leave to file a Behavior Clinic report and letter of transmittal dated February 10, 1960. Since the trial court's records contained no reference to the filing of such a report, petitioner's counsel objected to its being filed in 1965, and sought leave to prove that the certification of filing in 1960 was in error. The trial court resolved the issue by permitting the report to be filed with the understanding that it would not be considered in disposing of the post-conviction petition, thus rendering moot the dispute as to whether it had ever before been filed. (Abst. 68.)

The Supreme Court of Illinois committed double error y relying upon the report of the Cook County Behavior linic to excuse the failure to hold a sanity hearing. In ie first place, the judge who heard the present post-con- ction petition specifically indicated that he would not onsider the Behavior Clinic report, and on that basis de- ied petitioner an opportunity to show that it was never led with the trial court in the original case. (Abst. 68.) lore important, the Cook County Behavior Clinic is not mpowered to "try" the issue of competency to stand ial. That duty falls upon a jury, duly empaneled to de- de the issue. The original trial court's failure to afford etitioner a hearing cannot be excused because an em- loyee of the Behavior Clinic thought he was competent. is counsel alleged that he was not, and the purpose of a anity hearing is to resolve such a dispute in accordance ith due process of law. By failing to hold such a hear- g, Illinois den ed petitioner due process of law.

VII.

SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER ILLINOIS WRONGFULLY PENALIZED PETITIONER FOR TESTIFYING BY PERMITTING THE STATE TO PROVE PRIOR CONVICTIONS IN REBUTTAL.

Illinois law provides that if a defendant in a criminal ase testifies in his own behalf, the state may prove in re- uttal prior convictions of the defendant of "infamous rimes" for the purpose of reflecting on the defendant's redibility. (Ch. 38, § 734, Ill. Rev. Stat. 1959.)

In the courts below, petitioner attacked this law on the round that introduction of an 11-year old conviction at

his trial violated his rights under the Due Process Clause.* Here again, Illinois penalized the defendant for exercising his constitutional right to testify in his own behalf. Introduction of the prior conviction, which has no reasonable bearing upon defendant's credibility, and which is actually treated by the jury as evidence that the defendant committed the crime for which he is on trial, is the obverse of the practice which was held unconstitutional in *Griffin* v. *California*, 380 U.S. 609 (1965).

This Court's recent decision in *Spencer* v. *Texas*, 87 S.Ct. 648 (1967), does not address the issue presented here. Under the procedure involved there, the government proved the prior conviction as part of its case in chief. Here, however, the past convictions are established only if and after the defendant takes the stand.

This Court should grant defendant's petition to resolve the issue of the validity of this widespread but fundamentally unfair procedure.

CONCLUSION

Petitioner earnestly prays that this court issue its writ of certiorari to the Supreme Court of Illinois to review the substantial federal questions raised herein.

Respectfully submitted,

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July 11, 1967

---

* Although this contention was fully argued to the Supreme Court of Illinois, it is not mentioned in the court's opinion.

APPENDIX A

Opinion of the Supreme Court of Illinois

MR. JUSTICE SCHAEFER delivered the opinion of the court:

In April of 1960, a jury convicted the petitioner, William C. Witherspoon, of the murder of police officer Mitchell Stone, and fixed his penalty at death. The judgment was affirmed on writ of error. (*People* v. *Witherspoon,* (1963) 27 Ill.2d 483.) Thereafter the petitioner filed a petition for relief under the Post-Conviction Hearing Act. (Ill. Rev. Stat. 1963, chap. 38, pars. 826-832.) The trial court granted the State's motion to dismiss the petition on the ground that some of the claims asserted had been adjudicated and that others had been waived because they were not raised on the writ of error to review the judgment of conviction. In a memorandum opinion (No. 3559) this court denied writ of error, deciding some of the claims asserted adversely to the petitioner and holding that others had either been adjudicated or waived.

The petitioner has also sought relief by way of Federal *habeas corpus.* In *United States ex rel. Witherspoon* v. *Ogilvie,* (7th cir. 1964) 337 F.2d 427, the court of appeals reversed a determination by a district judge that the petitioner was entitled to be resentenced after being given an opportunity to present evidence in mitigation. The court of appeals also considered other claims advanced by the petitioner, and ordered the *habeas corpus* petition dismissed. Thereafter another *habeas corpus* proceeding was instituted by the petitioner in the United States District Court. The district judge stayed proceedings in that court until remedies in the State courts had been exhausted.

The attorneys appointed by the district court to represent the petitioner in the *habeas corpus* proceeding then filed in the circuit court of Cook County a petition which requested that it be considered under whatever form of remedy is "provided for by Illinois law", suggesting a petition under the Post-Conviction Hearing Act, (Ill. Rev. Stat. 1965, chap 38, pars. 122—1 to 122—7); *habeas corpus;* section 772 of the Civil Practice Act, (Ill. Rev. Stat. 1965, chap. 110, par. 72); a bill of review; a bill in the nature of a bill of review; *coram nobis; coram vobis; audita querela,* or any other appropriate remedy. After extended argument the trial judge dismissed the petition on his own motion on the ground that it failed to set forth facts sufficient to entitle the petitioner to relief. This appeal follows.

In his two prior appeals to this court and his appeal to the Court of Appeals for the Seventh Circuit numerous alleged trial errors have been considered. We need not now consider whether there may be situations in which a showing of innocence may be made by a defendant who has already resorted to direct and collateral review, as has the defendant in this case. (See *Anderson* v. *Gladden,* 234 Ore. 614, 383 P.2d 986, 991; *In re Sterling,* 63 Cal.2d 486, 407 P.2d 5, 7) Most of the petitioner's contentions have been raised previously and decided adversely, and the remaining contentions do not show any error that would affect the accuracy of the determination of the petitioner's guilt, or the fundamental fairness of his trial.

In his present petition the petitioner alleges, for the first time, that he was not advised of his right to remain silent or of his right to confer with counsel, and that his request to confer with counsel before making a statement was denied. In *Johnson* v. *New Jersey,* 384 U.S. 719, 16 L. Ed 2d 882, the Supreme Court held that the principles of

Escobedo v. *Illinois*, 378 U.S. 478, 12 L. Ed.2d 977, and the procedures required by *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, applied only prospectively. In *People* v. *McGuire*, 35 Ill.2d 219, *People* v. *Wallace*, 35 Ill.2d 251, and other cases, we have refused to apply those principles retroactively. Since this defendant was tried in 1960, *Escobedo* and *Miranda* do not apply.

The petitioner contends that the confession which was admitted in evidence against him was not voluntary. No such contention was advanced upon the direct review of the petitioner's conviction, which is reported in 27 Ill.2d 483. Such a claim was advanced in his first post-conviction petition, and in affirming the judgment dismissing that petition this court held that the contention had been waived. The petitioner now asserts that he did not knowingly waive this contention and did not authorize the attorney who represented him to do so, and he argues, therefore, that under the doctrine of *Fay* v. *Noia*, 372 U.S. 391, 9 L. Ed.2d 837, there was no effective waiver of this contention. The petitioner's present petition alleges with respect to the direct review of his conviction: "On one occasion, petitioner's court appointed counsel wrote petitioner a letter advising petitioner of the grounds which counsel intended to raise on the appeal, but counsel did not offer or permit petitioner to determine what should be argued and what should not be argued on the appeal."

This allegation is hardly consistent with the petitioner's assertion that there was no knowing waiver upon direct review. In any event, the contention that his confession was coerced was advanced in his petition for *habeas corpus* in the Federal court. Upon appeal in that case, the Court of Appeals pointed out that a full hearing had been held upon the petitioner's motion to suppress prior to the trial, and that the trial court had found the confession to have

been voluntary. The Court of Appeals then held that the District Court was not required to conduct an evidentiary hearing, and stated that "the record fairly supports the state factual determination." 337 F.2d at 430; *cert.* den. 379 U.S. 950.

Petitioner contends, for the first time, that the disqualification for cause of jurors having scruples against capital punishment violated his right to a trial by a jury which was fairly representative of a cross section of the community, and subjected him to trial by a jury which favored the prosecution in deciding the issue of guilt or innocence. Prospective jurors at petitioner's trial were asked: "Do you have any conscientious scruples or any religious scruples against the infliction of the death penalty in a proper case?" And other prospective jurors were asked: "Now, if you're selected as one of the twelve jurors and it should be your opinion, along with the other eleven jurors, after having heard all the evidence and the rules of law given by His Honor and you're back in the jury room, it should be your opinion, along with the other eleven, that the defendant is guilty, and the next part of your deliberation is to fix a penalty, and when you're at the penalty part of the deliberations it should be your opinion, along with the other eleven jurors, that the proper verdict in this case is that of death in the chair, based on the evidence as you have heard it here and the rules of law given by his Honor, would you so say by signing a guilty verdict?"

Petitioner's contentions in this respect are foreclosed by our opinion in *People* v. *Hobbs*, 35 Ill.2d 263. *Hobbs* states that a defendant's right to trial before a jury which is a cross section of the community does not include the "right to have some individuals on the jury who may be prejudiced in his favor, someone who is unalterably opposed to one o

the possible penalties with which he is faced." (35 Ill.2d at 272). *Hobbs* also answers the petitioner's contention that a death-qualified jury is likely to favor the prosecution on the issue of guilt or innocence. In *Hobbs* the court quoted the following language from *Tuberville* v. *United States*, 112 App. D.C. 400, 303 F.2d 411, (*cert.* denied 370 U.S. 946, 8 L. Ed.2d 813, 82 S. Ct. 1596): "Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment." (35 Ill.2d at 273.)

Nor are we persuaded to disallow challenges based on scruples because a study cited in the petitioner's brief indicates that some jurors qualified for the death penalty tend to favor the prosecution, or, as it is said, to be "prosecution prone." Since the same study indicates that jurors with scruples against the death penalty could be characterized as "defense prone", it is appropriate to continue to allow each side to challenge jurors for cause, and we adhere to the system in which each side is allowed to examine jurors and eliminate those who can not be impartial.

Petitioner contends, for the first time, that he was not afforded a hearing to determine his mental capacity to stand trial. His petition alleges that "facts were called to the attention of the trial judge which gave rise to a reasonable issue as to petitioner's mental capacity to stand trial. The obligation thereupon devolved upon the trial judge to hold an inquiry into that issue." The facts referred to are not stated, however. Upon these allegations we are unable to say that the trial judge erred in failing to hold a hearing. And any doubt concerning petitioner's mental capacity to stand trial is dispelled by the fact that he was examined by

the Behavior Clinic of the Criminal Court of Cook County, which reported that "psychological examination revealed an I.Q. of 111, indicating bright normal intelligence", and that "he knows the nature of the charge and is able to cooperate with his counsel."

Petitioner also objects that at the hearing on the present petition his attorney was not allowed to question the clerk of the court about his certification that the Clinic's report was filed on February 10, 1960. We can not say that denial of such an examination was error. The Clinic's report and an accompanying letter of transmittal from the examining physician to the trial judge indicate that the examination was reported to the trial court on February 10, 1960. The issue upon which the petitioner sought to question the clerk was whether or not these documents were stamped by the clerk of the court as filed on February 10, 1960, or at a later date. That issue was not significant. The petitioner did not allege that no examination was conducted.

The petitioner argues that he should have been allowed to introduce newly discovered evidence at the hearing below. He there alleged that since May of 1963 " * * * petitioner has discovered the existence of additional evidence to support his contention that his confession and admissions were not voluntary, but rather were the result of physical and mental coercion brought to bear on petitioner by the police. Petitioner requests an opportunity to introduce the testimony of a witness who observed petitioner when he was in the police station, and who can testify to petitioner's physical condition at that time."

We have held that "Applications for new trials on the ground of newly discovered evidence are not regarded with favor and must be closely scrutinized. In order to justify a new trial the newly discovered testimony must be cor

clusive and not merely cumulative, and the evidence must appear to be of such conclusive character that it will probably change the result if a new trial is granted." (*People* v. *Dukes,* 19 Ill.2d 532, 538-39.) Prior to trial the petitioner was afforded a hearing on his motion to suppress his confession as involuntary. Several hundred pages of the record are devoted to testimony concerning petitioner's condition and treatment during and prior to the time he made his statement. The allegations of newly discovered evidence tell nothing about the evidence, and do not suggest that it will be "conclusive and not merely cumulative" or that "it will probably change the result if a new trial is granted." The petition did not justify the request for leave to offer additional testimony.

The judgment of the circuit court of Cook County is affirmed. The clerk of this court is directed to enter an order fixing Friday, April 21, 1967, as the date on which the original sentence of the criminal court of Cook County shall be executed. A certified copy of the order shall be furnished by the clerk of this court to the Sheriff of Cook County.

Judgment affirmed.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

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No. 941 Misc.

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In the

Supreme Court of the United States

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

MOTION OF THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 344 Misc.

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

MOTION OF THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Now comes the petitioner, Illinois Division of the American Civil Liberties Union, by its attorney, Elmer Gertz, and represents unto the Court as follows:

1. The American Civil Liberties Union is an organization dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

2. One of the least examined, but most important, guarantees of our Bill of Rights is contained in the Eighth Amendment to the United States Constitution which prohibits the infliction of cruel and unusual punishment. The

last case in this Court to consider directly whether the death penalty was cruel and unusual punishment was *In re Remmler,* 136 U.S. 436 (1890), where it was held that the death penalty was not a cruel and unusual punishment. Since that time, however, this Court has indicated that that holding may no longer be valid. In *Trop* v. *Dulles,* 356 U.S. 86 (1958), it was said, on behalf of four justices, that the content of the Eighth Amendment is not static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 100. It is true that within that same opinion it was stated in passing, without any actual consideration of the matter, that the death penalty did not violate the constitutional concept of cruelty, but that statement was clearly dictum. Furthermore, in the nine years since that opinion was handed down, great changes in the attitude of society have come about in connection with the death penalty.

3. The petitioner in this case, William Witherspoon, in his petition for certiorari, has raised the point that the death penalty is cruel and unusual punishment. The nature of his position, however, having to present further issues involved in his case, has precluded him from fully delving into this problem. This issue is not unique to his case. It is one of great importance for many persons throughout the country. Petitioner in this motion, by virtue of its aims and objectives, namely, to uphold and strengthen the Bill of Rights, is in the unique position of being able to bring to this Court's attention many of the factors which bear upon this important issue free from any necessity to divert its efforts to other issues.

4. That the taking of a human life is cruel cannot be seriously disputed. The fact that the life is taken under sanction of the government cannot change this fact. In

deed, the manner in which the government carries out this function must of necessity enhance the cruelty involved.

5. In addition, there is much data to support the proposition that capital punishment is indeed unusual in our present society, and is becoming more and more unusual every year. Last year only one person, out of the thousands convicted of murder, was executed. The carrying out of a death sentence is in the nature of a game of chance, which, in itself, is violative of due process.

6. This case involves a further important question as to the manner in which the death sentence was imposed upon the petitioner Witherspoon. As pointed out on pages 13-16 of petitioner Witherspoon's petition for writ of certiorari, under the Illinois statutes in force at the time, one accused of murder who chose to assert his right to trial before a jury was deprived of the opportunity to introduce mitigating evidence before sentencing. The punishment was set by the same jury which determined guilt, and the opportunity to introduce evidence in mitigation was extremely limited under Illinois law. Such a procedure places the defendant in the impossible position of arguing that he is not guilty and at the same time of introducing evidence that even if he is guilty he should not be given the death sentence.

7. Under this procedure, which is still followed in Illinois (Ch. 38, §1-7, Ill. Rev. Stats. 1965), everyone found guilty of crime in Illinois was entitled to introduce evidence in mitigation of sentence after a finding of guilty, except those persons found guilty of murder by a jury. Thus, where an accused is exposed to the greatest penalty sanctioned by the law, he is precluded from fully informing the sentencing body of the pertinent factors which are to be taken into consideration in every other situation.

Had the accused been found guilty of the same crime b a judge, after having waived the constitutional right to jury trial, he would have had the opportunity to introduc such mitigating evidence. Such an issue is certainly on which should be considered by this Court.

8. The petitioner has received the consent of petitione William Witherspoon to file a brief *amicus curiae*, b the State has declared that it "cannot enter into a co sent"; it has not directly objected to such brief.

9. There are other constitutional issues in this cas such as the deprivation of the petitioner Witherspoon right to apply for certiorari in connection with his origin conviction. He had no counsel at that time.

This petitioner, therefore, respectfully requests that be allowed to file a brief *amicus curiae* in support of pe tioner William Witherspoon's petition for certiorari f the purpose of bringing to this Court's attention the ma reasons which support the necessity of this Court gra ing certiorari to consider whether capital punishment d violate the Eighth Amendment to the United States C stitution, as well as other basic constitutional issues.

Respectfully submitted,

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OCT 30 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

NO. ~~344 MISC.~~ 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents

(Petition for Writ of *Certiorari* to the Supreme Court of Illinois)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

NO. 344 Misc.

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents

(Petition for Writ of *Certiorari* to the Supreme Court of Illinois)

BRIEF IN OPPOSITION

OPINION BELOW.

The opinion of the Supreme Court of Illinois, reported at 36 Ill. 2d 471, 224 N.E. 2d 259 (1967), is reproduced in Appendix A to the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW.

1. Is a juror who will not, under any circumstances, return a death penalty verdict an "impartial" juror in a case where the People seek the death penalty for murder of a policeman? Is the State constitutionally prohibited from disqualifying such jurors in such a death penalty prosecution?
2. Are the constitutional rights of a defendant violated by a procedure wherein the jury fixes the penalty and the defendant is permitted to introduce evidence in mitigation before the jury?
3. Is the Illinois procedure which allows for commutation of the death penalty by the Governor on grounds of rehabilitation violative of due process? Is the State required to provide a judicial hearing on the question of rehabilitation? Is the State constitutionally prevented from setting the death penalty for the crime of murder? Is the death penalty cruel and unusual punishment when a defendant deliberately murders a uniformed police officer acting in the line of duty? Is this Court the proper forum for a debate and decision concerning the wisdom of capital punishment?
4. Where the facts surrounding the giving of pre-trial statements, made prior to *Escobedo* v. *Illinois,* are brought out in a motion to suppress, and the statements are clearly voluntary, is there any purpose

served by a further judicial review of the "totality of the circumstances" surrounding the statements?

5. Whether a convicted defendant must be given a hearing to present a newly discovered witness, when the petition fails to show that the movant has been diligent, when it fails to show that the witness' testimony is conclusive rather than merely cumulative, and when the petition is not supported by an affidavit from the witness?

6. Is a State court constitutionally required to impanel a jury to decide a defendant's competency to stand trial when defendant's counsel requests and is granted a psychiatric examination of defendant, when the psychiatrist diagnoses defendant as competent, and when no request for a hearing is made?

7. Does the Illinois practice of allowing impeachment of a defendant who testifies, by showing that the defendant has been previously convicted of an "infamous crime," deprive defendant of a fundamentally fair trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

These are adequately set forth in the Petition.

STATEMENT OF THE CASE

The Murder

At about 4:30 A.M. on April 29, 1959, during the course of an attempt to evade arrest by a uniformed Chicago patrolman, William Witherspoon shot and mortally wounded the patrolman, Officer Mitchell Stone. (A. 11, 25, 55)* Immediately after shooting Officer Stone, Witherspoon kicked the wounded officer's hand and knocked the officer's service revolver from his grasp. (A. 94) Witherspoon then fled the scene without stopping to aid or to obtain help for the dying patrolman. (A. 139) At the time of the shooting, there were three outstanding warrants for Witherspoon's arrest. Each of these was introduced at trial on the question of motive, and they are as follows:

> People's Exhibit 1—Arrest warrant charging Armed Robbery of $125.00 U.S.C., issued April 19, 1959, City of Detroit, Wayne County, Michigan. (A. 72)
>
> People's Exhibit 2—Arrest warrant charging Armed Robbery of $3,000 U.S.C. and diamonds valued at $7,000.00, issued April 22, 1959, City of Lincoln Park, Wayne County, Michigan. (A. 77)
>
> People's Exhibit 7—Warrant charging unlawful flight to avoid prosecution, issued April 27, 1959, United States District Court, Eastern District, Michigan. (A. 83).

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* "A" refers to the printed Abstract filed in the Illinois Supreme Court on petitioner's original appeal. "R" refers to the transcript of petitioner's trial found in Volumes I, II, and III. "Abst." refers to the printed abstract filed in the Illinois Supreme Court in the instant case. This is the usage adopted in Petitioner's Brief.

The events leading to the murder, as brought out by the evidence, are as follows: On April 24, 1959, William Witherspoon (petitioner herein) and Frank Osso (a/k/a Frank Dyrda) arrived in Chicago from Detroit in petitioner's automobile, carrying with them a quantity of jewels, the proceeds of a Michigan armed robbery, and a Random Polish military pistol. (A. 90, 123, 134, 143). Witherspoon was familiar with Chicago, having been in and out of the city throughout the years when he worked occasionally as an interstate truck driver. (A. 135) Witherspoon checked into a motel on the South side of Chicago, 2300 South Michigan, and the next day, April 25, 1959, he rented an apartment at 4650 West Maypole Avenue, on the West side. (A. 133)

On April 28, 1959, the petitioner had the loaded pistol (People's Exhibit 3) on his person. He had reason for thinking it was "necessary." (A. 134) Witherspoon was familiar with small arms. (A. 143). Through the evening of April 28 and the early morning of April 29 the petitioner carried the pistol in a concealed manner for ten to twelve hours while he went about various places in Chicago. (A. 135, 136-37).

Witherspoon and Frank Dyrda had parked the petitioner's car in a gas station parking lot on the southeast corner of 11th and Wabash sometime during the early morning of April 29. They went to several taverns and the petitioner drank "conservatively" (A. 124), "because I knew I had a loaded gun" (A. 136).

In a tavern in the vicinity of 11th and Wabash Witherspoon met one Helen Murray, whose name, address and telephone number he originally concealed from the police. (A. 91, 134) After his arrest, petitioner told police that he gave her $50.00 to spend the night with him. (A. 91)

At trial, Witherspoon testified that he took the diamonds to Helen Murray, and that she agreed to arrange a Chicago fence for the jewels he brought from Detroit. (A. 123-24) He further testified that he gave her $50.00 because she said that she was indebted to the fence and needed the $50.00 to square the debt. (A. 123)

Witherspoon told the police that Helen Murray decided not to spend the night with him. By this time, around 4:00, a.m., all the taverns were closing and Witherspoon, Dyrda and Helen Murray were in a restaurant at Wabash and Roosevelt (formerly 12th Street). Helen Murray left the restaurant, and Witherspoon followed her into the street. Dyrda remained in the restaurant. Witherspoon and Helen Murray then began to argue while on the southwest corner of Wabash and Roosevelt. Witherspoon was holding on to her but she pushed him in the chest and wrenched herself from his grasp. (A. 6, 8-9, 91-92).

At this time a marked Chicago police squad car, containing uniformed officers Mitchell Stone and Gerald Marzillo and assigned to patrol the area, came up to the corner and stopped for a red light. After wrenching free from Witherspoon, Helen Murray ran to the squad car and told Officers Stone and Marzillo that the defendant was carrying a gun. (A. 5, 6, 9)

Witherspoon, who was at the rear of the squad car, heard the conversation between the policemen and Helen Murray. (A. 92) He fled immediately, walking very fast across the street into a parking lot and hiding there in one of many parked trailers and tractors. Officers Stone and Marzillo turned on the flashing red light atop the squad car. Officer Marzillo called out to the defendant. (A. 6, 9, 10) Both officers left the car and began to search the parked tractors and trailers using

flashlights. (A. 6) Then Witherspoon leaped from one of the trucks and started to run east on Roosevelt toward Michigan Avenue, which is one block east of Wabash. Officer Stone gave chase and yelled for Witherspoon to stop. Officer Marzillo returned to the squad car and started to drive east on Roosevelt toward Michigan Avenue when he heard gunfire. Officer Marzillo put through a radio call for help and began a search. He found his partner, Officer Stone, wounded in a parking lot at 1241 South Michigan. The dying Officer Stone told Officer Marzillo what had happened and gave him a description of Witherspoon. (A. 71, 125. See A. 26)

What had happened was this: Witherspoon, with Officer Stone in pursuit, reached Michigan and ran south thereon to the parking lot at 1241 South Michigan. He sat down and hid in one of the many two-wheel trailers in the lot (A. 93, 126) Witherspoon saw the uniformed officer enter the lot and flash his flashlight into the trailers. (A. 126) When Officer Stone found the petitioner hiding in a trailer, he said, "You've got a gun. The girl told me. I want it." (A. 127) The officer then turned off his flashlight and began to search the petitioner, who held the gun in his hand. Officer Stone, who was a young and somewhat inexperienced police officer, conducted what Witherspoon called a "very bad" search and failed to find the weapon. He then told Witherspoon to get out of the trailer. (A. 3, 126) In Witherspoon's words, "as I approached the policeman I fired a shot at him." (A. 16) Witherspoon fired a series of shots from the Random pistol, a lueger. (According to a witness, the lueger shots came first. (A. 25)) Officer Stone fired shots in return and Witherspoon fired again. (A. 11, 25, 55).

The petitioner's comment on the incident was, "The officer was doing his job and it was my job—I was trying to get away, to avoid arrest." (A. 94, 139)

After Officer Stone fell to the ground, Witherspoon kicked the officer's gun from his hand. (A. 94) Petitioner did not give any aid to or attempt to secure help for the wounded officer. At trial Witherspoon said ". . . I never at any time endeavored to get any type of medical help to this officer that had been shot . . . I was interested in getting out of that area quickly . . . The only one I was interested in that night was Witherspoon." (A. 138-39)

Witherspoon fled to the gas station at 11th and Wabash, where he had previously parked his car. (A. 127) However, he did not go to his car but asked the station attendant to phone for a cab. (A. 14) The petitioner then went to the station washroom and looked through the window. He saw uniformed police on the street and put the murder weapon in the toilet flush box. Meanwhile Officers Cowhey and Dunleavy had questioned the attendant. The officers then went to the washroom where they arrested the petitioner. (A. 128) Detective Thedos arrived and assisted in the arrest, handcuffing Witherspoon to himself. The defendant said nothing at this time. (A. 20)

The three officers then drove the petitioner to St. Luke's Hospital. (A. 18) Officer Mitchell Stone had been taken to the emergency room of St. Luke's. He was conscious but was suffering from an abdominal bullet wound which subsequently caused a fatal hemorrhage. (A. 41-42) Later, Witherspoon said he aimed and shot low at Officer Stone. (A. 137) When Witherspoon entered the emergency room, Officer Stone pulled himself up to a sitting position and said, "that is the man that shot me." (A. 8, 19) Officer

Marzillo also identified the defendant in the emergency room. (A. 8)

When these identifications were made Witherspoon stood mute, but when Officers Cowhey, Dunleavy and Detective Thedos returned with Witherspoon to the squad car and began to drive away from the Hospital, Witherspoon admitted that he shot Officer Stone. (A. 19, 22, 34)

The squad car was driven back to the gas station at 11th and Wabash. While they had been away Officer Downes and the station attendant, James Clements, had found the murder weapon in the flush box where petitioner had hidden it. Officer Downes showed the gun to Witherspoon, who immediately identified it as his weapon, the one "I shot him with." (A. 19, 22)

Witherspoon was then taken to the First District Police Station at 1121 South State Street. There, the defendant gave interviews to newspaper reporters and lectured the police to the effect that younger officers should be taught how to frisk persons and how to shoot. (A. 35, 36, 44, 67, 68, 137). Witherspoon informed the police that the tattoo on his left-hand knuckles read "l-o-v-e" and that the tattoo on his right hand knuckles read "h-a-t-e". He stated that the word "h-a-t-e" meant "hate all police." (A. 100) The tattoos on his knuckles were visible at trial. (A. 144)

About two hours after the murder was committed, John Stamos, then an Assistant State's Attorney, arrived at the police station and took a written statement from the petitioner (A. 61, 88-95) Around 10:30 a.m. of the same morning the petitioner inquired after the health of Officer Stone and was informed that he had died. (A. 143) At noon, Witherspoon read the transcribed statement

taken from him by Mr. Stamos but refused to sign it until he saw an attorney. (A. 132)

The Litigation

A. Trial

The petitioner was indicted for murder by the October Term Grand Jury. During these State proceedings petitioner was represented by three appointed counsel, of whom the chief counsel was Thomas Cernek (then Chairman of the Chicago Bar Association Committee for the Defense of the Indigent). Counsel for petitioner filed a motion requesting a Behavior Clinic examination. (R. 57) The motion was granted, an examination was had, and petitioner was found competent by the court psychiatrist. (Rec. 82-85)[1] No further motion for additional psychiatric examinations or for a competency hearing were made. (Abst. 68) A motion to suppress petitioner's statement was also filed, and an extensive hearing on the motion was conducted. (R. 140-621) The motion was denied, the trial court finding the statement to be voluntary. A jury was impanelled and a lengthy trial was had, after which the jury returned a verdict of "guilty". The punishment was fixed at death. The court entered judgment on the verdict and sentenced the petitioner to death on April 25, 1960. (A. 1-4)

B. Appeal

The Supreme Court of Illinois appointed James L. Coghlan and the firm of Coghlan, Coghlan and Joyce as counsel for petitioner on appeal. Counsel filed an exten-

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1. "Rec." refers to the record of the proceedings on the instant petition in the Circuit Court of Cook County.

sive brief alleging some fifteen separate trial errors.[2] The petitioner expressly waived any challenge to the ruling on the motion to suppress. (A. 4) On March 25, 1963, the Supreme Court of Illinois affirmed petitioner's conviction and filed a lengthy opinion. *People* v. *Witherspoon,* 27 Ill. 2d 483, 190 N.E. 2d 281. A petition for rehearing was denied.

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2. Petitioner states that counsel filed the brief without consulting him. (Petitioner's Brief, p. 8). This point was debated below in the context of a waiver argument propounded by the People. The Supreme Court of Illinois declined to rule on the waiver point but instead considered the merits directly. Nevertheless, the respondent cannot leave unchallenged the incredible statement that petitioner was not consulted on his appeal.

Petitioner had the rare fortune to have a skilled appeal counsel who, not having represented petitioner at trial, was not committed to any tactical decisions made at trial. Petitioner alleged that "On one occasion, petitioner's court-appointed counsel wrote petitioner a letter advising petitioner of the grounds which counsel intended to raise on the appeal, but counsel did not offer or permit petitioner to determine what should be argued and what should not be argued on the appeal. Mr. Justice Schaefer commented that "This allegation is hardly consistent with the petitioner's assertion that there was no knowing waiver on direct review" *People* v. *Witherspoon,* 36 Ill. 2d 471, 224 N.E. 2d 259, 262 (1967) (Appendix A—Petitioner's Brief, App. 3). The conclusion of the Court is fortified by several incidents. At trial, petitioner insisted on calling a witness against the advice of counsel and after admonition by the court. (R. 1326-1328). Petitioner hardly exhibited a sheepish deference to decisions of counsel. Indeed, petitioner is quite capable of filing his own Supplemental Brief when dissatisfied with his counsel. In the instant case Mr. Jenner filed his brief in the Supreme Court of Illinois on October 22, 1966. On Novem-

C. First Collateral Attack in Federal Courts.

The petitioner, with the aid of his third capable court-appointed counsel, Julius Echeles, sought a writ of *habeas corpus* in the United States District Court, Northern District of Illinois. On November 4, 1963, the writ was denied for failure to exhaust state remedies.

D. First Collateral Attack in Illinois Courts.

Petitioner attacked his conviction by pursuing both *habeas corpus* relief and the statutory post-conviction remedy. Petitioner challenged the admissibility of his statement and the procedure by which the jury fixed petitioner's penalty. The arguments urged on appeal were generally reiterated under a theory that the "totality of errors" deprived petitioner of his right to a fair trial. The trial court dismissed the petition, and the Supreme Court of Illinois affirmed on January 17, 1964, in an unreported opinion.

E. Second Collateral Attack in Federal Courts.

The petitioner again sought federal *habeas corpus* by filing an amended version of his first federal petition. His petition, filed by Mr. Echeles, challenged the admissibility of his confession and the procedure by which the jury

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ber 8, 1965, petitioner filed a Supplemental Brief over his own signature, and the ineptitude of the Supplemental Brief leaves no doubt that it was drafted by petitioner. On petitioner's original appeal he never filed any supplemental brief or letter of protest during a period of several months between the filing of briefs, the argument and the decision of the case. Under the particular facts of this case, it cannot be disputed that petitioner knew of counsel's proposed actions and agreed with them.

fixed the penalty. The petitioner offered no evidence on the confession issue, which was resolved by a review of the extensive state court hearing. On March 24, 1964, the Court remarked that "I do not see that it was coerced." (March 24, 1964, Hearing Transcript, p. 7)[3] Then the Court denied the writ as to petitioner's claim that admissibility of the statement was determined by use of an improper standard, but awarded the writ to the extent of remanding petitioner to the state court for a hearing in mitigation prior to imposition of sentence.

Appeals from the rulings of the District Court were taken by both parties. On September 28, 1964, in a lengthy opinion, the Court of Appeals reversed that part of the District Court's order awarding the writ and remanded the cause with directions to dismiss the petition. *United States ex rel. Witherspoon* v. *Ogilvie*, 337 F. 2d 427 (7th Cir.)

F. Petition For Certiorari Denied.

The petitioner sought a writ of *certiorari* from this Court to the Court of Appeals. Mr. Echeles' petition challenged the standard by which petitioner's statement was judged admissible and the use of the "Orthodox" rule for determining voluntariness, contending that *Jackson* v. *Denno*, 378 U.S. 368, rendered the use of this method unconstitutional. In the petition it was argued further that petitioner's statement was inadmissible under the rule of *Escobedo* v. *Illinois*, 378 U.S. 478, and that the procedure by which petitioner's sentence was fixed was unconstitu-

3. This transcript is contained in the Record which was before this Court in 1964 when it denied certiorari. [No. 602 Misc.—379 U.S. 950]

tional. Respondents filed a brief in opposition, and petitioner replied. *Certiorari* was denied on December 14, 1964. *Witherspoon* v. *Ogilvie*, 379 U.S. 950.

G. Third Collateral Attack in Federal Courts.

Petitioner filed another petition for the writ of *habeas corpus*, and his present counsel were appointed to represent him. Although respondents expressly stated their willingness to stipulate that all state remedies had been exhausted, petitioner's counsel insisted on returning to the state courts to further exhaust state remedies. In February, 1965, the District Court entered an order staying further proceedings until petitioner had exhausted all available state remedies.

H. Second Collateral Attack in State Courts.

On February 19, 1966, petitioner filed a petition demanding some remedy and suggesting several possible remedies. Of these suggested remedies, five were abolished by the Civil Practice Act of Illinois, one was barred by the limitations of the Civil Practice Act, one was barred by statute and court rule, and the last was based on a repealed statute. (Abst. 2-3, 15-8) The respondents filed a motion to strike the petition for lack of jurisdiction and then a motion to dismiss the petition. The court acted on neither motion. The substance of the petition will be discussed in *Reasons For Denying the Writ, infra*. The petitioner appealed the dismissal, and, on the appeal, petitioner filed a Supplemental Brief of his own. The Supreme Court affirmed. 36 Ill. 2d 471, 224 N.E. 2d 259 (Appendix A, Petitioner's Brief).

The instant petition requests that a Writ of *Certiorari* issue to the Supreme Court of Illinois, to review this latest judgment.

ARGUMENT

I.

THE DISQUALIFICATION OF VENIREMEN HAVING CONSCIENTIOUS OR RELIGIOUS SCRUPLES AGAINST IMPOSITION OF THE DEATH PENALTY IN A CAPITAL CASE PRESENTS NEITHER A NOVEL NOR A SUBSTANTIAL ISSUE.

In the court below the petitioner argued for the first time that a juror, who will not under any circumstances sign a death penalty verdict, should not be disqualified from sitting in judgment when the People demand the death penalty for the murder of a policeman. The petitioner claims that such disqualifications deprived him of a 'representative' jury. Yet, "it will readily be seen that this 'balanced jury,' which the defendant envisages, is in reality a partisan jury." *United States* v. *Puff*, 211 F. 2d 171 (2nd Cir. 1954). See *Pope* v. *United States*, 372 F. 2d 710 (8th Cir. 1967); *United States ex rel. Dukes* v. *Sain*, 247 F. 2d 799, 802, 803, (7th Cir. 1962), *cert. denied*, 369 U.S. 868. Under Illinois law any juror can hang the jury if he cannot have his way as to the sentence which he deems appropriate. *Cf. Andres* v. *United States*, 333 U.S. 740, 766 (1948) (concurring opinion). The petitioner seeks to place in the seat of judgment one or more jurors who are irrevocably opposed, before hearing a word of testimony, to the verdict sought by the People. *People* v. *Hobbs*, 35 Ill. 2d 263, 277, 220 N.E. 2d 469, 474 (1966).

In a case involving the disqualification of jurors for scruples against imposition of the death penalty, this Court said—"A juror who has *conscientious scruples* on

any subject which prevent him from standing indifferent between the government and the accused, and from trying the case according to law and the evidence is not an impartial juror." *Logan* v. *United States*, 144 U.S. 263, 298 (1892). (Emphasis added.) For the relatively objective criterion of "conscientious scruples" on which jurors may be examined under oath on *voir dire*, petitioner wishes to substitute criteria such as "prosecution prone", "defense prone" or even "authoritarian personality."[4] One wonders how, without ordering psychiatric examinations for an entire venire, such psychological "proneness" can be discovered during *voir dire*.

The idea of "proneness" is not related in any way to the legal standard of impartiality. Petitioner cites surveys purporting to disclose that some jurors qualified for the death penalty are "prosecution prone" and that jurors with scruples against the death penalty are "defense prone". Where then is the "impartial" juror? It is not surprising that the Illinois Supreme Court decided to "adhere to the system where each side is allowed to examine jurors and eliminate those who can not be impartial." *People* v. *Witherspoon*, 36 Ill. 2d at 476, 224 N.E. at 262.

In *Turberville* v. *United States*, 303 F. 2d 411 (D.C. Cir. 1962), *cert denied*, 370 U.S. 946, the Court observed that "being not opposed to capital punishment is not synonomous with favoring it." Juries qualified to return a death penalty verdict have frequently returned verdicts of "not guilty" and verdicts of "guilty" without fixing the death penalty. "Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial

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4. Oberer, "Does Disqualification of Jurors For Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt," 39 Tex. L. Rev. 545, 553 (1961).

arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment." *People* v. *Hobbs*, 35 Ill. 2d at 273, 220 N.E. 2d at 474.

If the government of the People enacts a law proscribing certain conduct and prescribing certain penalties, no man has a right to have individuals unalterably opposed to the law given the power to nullify the law. In *People* v. *Riser*, 47 Cal. 2d 566, 305 P. 2d 1 (1956) (Traynor, J.), *appeal dismissed*, 358 U.S. 646 (1958), the Court said that abolition of the disqualification of jurors with scruples against the death penalty "would in all probability work a *de facto* abolition of capital punishment."

This Court should allow its own precedents, the opinions of the various Circuit Courts of Appeal and the opinions of the State Appellate tribunals to stand.

II.

THE ILLINOIS STATUTE PROVIDING THAT THE JURY SHOULD FIX THE PUNISHMENT IN A MURDER CASE DID NOT IN EFFECT UNCONSTITUTIONALLY PENALIZE PETITIONER FOR EXERCISING HIS RIGHT TO A JURY TRIAL.

Petitioner again attempts to raise substantially the same argument which was rejected once before by the Court of Appeals [*United States ex rel. Witherspoon* v. *Ogilvie*, 337 F. 2d 427, 431 (7th Cir. 1964)], and which was thereafter presented to this Court and found insufficient to warrant grant of *certiorari*. [*Cert. denied*, 379 U.S. 950] This argument is that the defendant was required to forego the opportunity to introduce mitigating evidence as the price of a jury trial.

The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases [*Spencer* v. *Texas*, 87 S. Ct. 648, 652 (1967)]. The practice of allowing the jury to fix the penalty in a criminal case has been held to be constitutional. [*Lindsey* v. *United States*, 133 F. 2d 368 (D.C. Cir. 1942)], and is the prevailing practice in the country. Further, the complete absence of a hearing in aggravation or mitigation, as where a mandatory penalty is provided, does not violate due process. *Williams* v. *New York*, 337 U.S. 241, 252 (1947); *People* v. *Burnett*, 394 Ill. 420, 425, 68 N.E. 2d 758 (1946).

In the instant case petitioner was not prohibited from introducing mitigating evidence during the trial of the case. The decisional law of Illinois expressly gives petitioner this privilege. "Evidence must be admitted if it tends to prove a substantial ground to lessen the punishment and to reduce it below the maximum fixed for murder." *People* v. *Crump*, 5 Ill. 2d 251, 258, 125 N.E. 2d 615, (1955). See also *People* v. *Mangano*, 375 Ill. 72, 77, 30 N.E. 2d 428 (1940). The trial record reflects references to petitioner's unfortunate childhood and his prior naval service. The very defense of accident offered by petitioner is mitigating in nature.

Significantly, the People are prohibited from introducing evidence in aggravation before the jury. Further it will be noted that only where a defendant testifies, in defense, that the State on rebuttal can impeach by a prior conviction for an infamous crime within the Illinois statutory enumeration. If the prior conviction is not "infamous" under the Illinois statute, it cannot be shown. Had the People been given this opportunity, they were prepared to show a long record of misconduct of petitioner in both civilian and military contexts. The petitioner was

distinctly advantaged by the procedure under which he was tried, and no constitutional question arises which would warrant grant of certiorari.

III.

THE IMPOSITION OF THE DEATH PENALTY FOR THE MURDER OF A POLICE OFFICER ACTING IN THE LINE OF DUTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The petitioner attacks the imposition of the death penalty in his case, giving three grounds to support his argument.

First, the petitioner claims that he is "rehabilitated." Under Illinois law there is no provision for a collateral attack on sentence, nor is there any provision for judicial determination of question of rehabilitation. However, Illinois is one of the few states in which the executive recognizes "rehabilitation" as a ground for commutation of sentence. When petitions for clemency are filed, the Pardon and Parole Board conducts full hearings and makes recommendations to the Governor in whose hands the decision finally rests. The Illinois procedure is outlined in Lavinsky, "Executive Clemency; Study of a Decisional Problem Arising In The Terminal Stages Of The Criminal Process," 42 Chi-Kent L. Rev. 13 (1965).

In *Solesbee* v. *Balkcom*, 339 U.S. 9 (1950), it was held that due process is served when the issue of competency for execution is determined by the Governor of a state aided by the recommendations of experts. The procedure in *Solesbee* did not allow for an adversary proceeding or the opportunity to present evidence. This Court further held that determination of competency for execution is a

matter related to the power of executive clemency. 339 U.S. at 12. See also *Caritativo* v. *California*, 357 U.S. 549 (1958). The instant case involves a far more conventional aspect of the exercise of executive clemency than in *Solesbee, i.e.*, the commutation of sentence for a "reformed" convict. The instant case also involves a far more conventional procedure in which an administrative body conducts public hearings at which a petitioner may be represented by counsel and may present evidence. The administrative body, exercising its expert judgment, makes recommendations to the Governor. The instant case is controlled *a fortiori* by *Solesbee*.

Second, petitioner contends that the death penalty serves no legally acceptable purpose of punishment.

Petitioner grounds his argument on the assertion that modern scientific knowledge demonstrates that capital punishment has no deterrent or other redeeming social benefit. The claim is exaggerated. Studies of the death penalty are inconclusive and no study has ever been made of murders that have not been committed, and this seems to be the relevant subject of study. Every year several dozen robberies or burglaries are committed by men who carry unloaded guns. This fact alone would indicate that there is a substantial possibility that at least a small number of innocent lives are saved by the existence of the death penalty. Even the chance that a small, statistically insignificant number of lives may be saved is sufficient to justify the application of the death penalty to convicted murderers.

The imposition of capital punishment also serves the purpose of permanently incapacitating the convicted murderer. This is certainly a legally acceptable purpose of punishment and, in light of a recent case in Illinois where

four inmates were convicted for the murder of prison guards,[5] not a meaningless fiction.

Finally, the infliction of the death penalty upon petitioner for the murder of a uniformed policeman acting in the line of duty serves to reinforce societal inhibitions against killing, harming or seriously attacking police officers, whose duty requires both proximity and vulnerability to the violent events of a modern life.

Third, petitioner claims that the death penalty is proper when inflicted on those who murder for hire or other direct economic gain, and he contends he does not belong in this class of persons. The record belies this contention. Shortly after the murder Witherspoon said that Officer Stone had a job to do and "I had a job to do. I was hot and I didn't want to be taken in. I was wanted for robberies in Detroit, I had been in the penitentiary before and I didn't want to go back. That's why I shot." (A. 54) Witherspoon said he was "very careful in that night in all my activities" (A. 138). He also disclaimed any personal animosity toward his victim. "I don't have no thrills at shooting him or nothing like that. It was my job. I was trying to get away." (A. 94) It is significant that petitioner uses the word "job" to describe his conduct, much as one who kills for hire would. Witherspoon coldly and deliberately killed a policeman for the purpose of securing his escape from rightful imprisonment. There is nothing in the facts herein which justifies a differentiation between petitioner and the class of murderers which petitioner arbitrarily creates.

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5. *People* v. *Stamps et al.*, Circuit Court, Seventh Judicial Circuit, Sangamon County, Illinois (1967).

Fourth, petitioner complains of the repeated delays and setting of dates of execution in his case. The various delays and re-setting of dates of execution are due to proceedings initiated by the petitioner himself in State and Federal Courts, and self-caused pressures obviously cannot constitute a deprivation of constitutional rights. *Cf. Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947). The combination of delay and approaching dates of execution are nothing less than a windfall to petitioner, for they create publicity and the opportunity to get support for petitioner's cause. Lavinsky, "Executive Clemency" 42 Chi-Kent L. Rev. at 27-28. The setting of dates of execution is necessary to allow petitioner to pursue whatever remedies are left to him by a certain date, to warn petitioner so that he may put his personal affairs in order, and to encourage petitioner's dispatch in pursuing his remaining remedies so as to avoid delays such as those which petitioner now attacks. The only other alternative to the practice followed is for executions to be carried out without any previous notice.

Ever since the case of *In re Kemmler,* 136 U.S. 436 (1890), in which this Court held that the imposition of the death penalty by means of electrocution was not cruel and unusual punishment within the meaning of the federal constitution, the courts have consistently sustained the constitutionality of capital punishment. *E.g. Trop* v. *Dulles,* 356 U.S. 86, 99 (1957); *Jackson* v. *Dickson,* 325 F. 2d 573, 575 (9th Cir. 1963), *cert. denied,* 377 U.S. 957 (1964). There are, of course, differences of opinion about the wisdom of capital punishment, but debates about the wisdom of capital punishment belong in the legislatures and not in constitutional forums such as this Court. Congress has provided the death penalty in cases involving

kidnapping, wrecking trains, treason, narcotics, murder of federal agents, bank robbery, espionage, explosives and assassination of the President or Vice-President.[6] New York, which is the only State with large concentrations of urban population to recently abolish the death penalty, would still impose the death penalty on petitioner, since he killed a uniformed police officer acting in the line of duty. Sec. 1045, New York Penal Law, McKinney's Consol. Laws (Supp. 1966). Finally, in Illinois, whose legislature debates the question each session, the House of Representatives defeated a bill providing for a moratorium on the death penalty by a vote of 98 to 68. Illinois Journal of the House of Representatives, May 17, 1967, pp. 33-34 (H.B. 157).

Petitioner's claim that the death penalty in his case is cruel and unusual punishment is without merit.

IV.

THE PETITIONER'S NUMEROUS STATEMENTS WERE VOLUNTARY AND THE FACTS SURROUNDING THE STATEMENTS WERE FULLY PRESENTED.

In the court below petitioner argued that his confession was inadmissible under the rule of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). The same argument had been presented to this Court when *certiorari* was denied previously.

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6. Kidnapping, 18 U.S.C. 1201; Wrecking Trains 18 U.S.C. 2381; Treason 18 U.S.C. 2381; Selling Narcotics to a Minor, 21 U.S.C. 176 (b); Murder, 18 U.S.C. 1111, 1114; Bank Robbery, 18 U.S.C. 2113, Espionage 18 U.S. 794, 42 U.S.C., 2272, 2274, 2276; Explosives 18 U.S.C. 837; Assassination of President, 18 U.S.C. 1751.

[*Witherspoon* v. *Ogilvie,* Sheriff, 379 U.S. 950 (1964).] Petitioner now abandons this same argument and shifts to a new ground, never presented to any other court. Petitioner's brief in the court below was, of course, filed before *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). He now claims that he should have been allowed to show that he was not warned of his right to remain silent or of his right to counsel.

That petitioner even makes his claim is somewhat surprising. He previously claimed with great vigor that the record established a violation of *Escobedo,* yet now he asserts the record is unclear.

In fact, the trial and the motion to suppress did fully elucidate the facts surrounding the various statements made by petitioner. These facts will be reiterated here because they show that under the "totality of circumstances" the statements were voluntary and that the state court's findings of voluntariness was supported by the record. See *United States ex rel. Witherspoon* v. *Ogilvie,* 337 F. 2d 427, 430. The record shows that petitioner was a 36-year old man at the time of his confession. In the words of his federal *habeas corpus* counsel, petitioner "had been previously convicted of crime. He was wanted as a suspect for other crimes in Michigan. He was not inconversant with his rights." (*Brief for Relator, Witherspoon* p. 23, United States Court of Appeals). Petitioner testified he was arrested around 4:30 A.M. on April 29, 1959 at the gas station at 11th and Wabash. He was then taken in a squad car to St. Luke's Hospital where he was identified by the dying Officer Stone and by Stone's partner Officer Marzillo. Petitioner claimed that, as he was leaving the hospital, several officers including Marzillo swung at him and that some blows landed. (Rec. 140-163.) Mar

zillo and the other officers at the hospital specifically denied this. (Rec. 395-397; 288-595).

The defendant returned to the squad car with the arresting officers. As the squad car started back to the gas station, Officer Cowhey told petitioner "You've been identified." Petitioner then said "All right, I shot him." (Abst. 34, 22). After arriving at the gas station petitioner was shown the murder weapon which other officers had found, whereupon petitioner said, "that's the gun I shot him with" (Abst. 19, 22).

Thus the record shows that within at most one half-hour after arrest petitioner had confessed on two occasions with little or no formal interrogation. The record further shows these statements were made while in the custody of Officers Dunleavy, Cowhey and Thedos. Petitioner repeatedly testified that none of these officers beat or threatened him and had no complaint about any of the acts of these three officers. (Abst. 140-41, Rec. 235-38)

Petitioner was then taken to police headquarters where he elaborated on his motive in killing Officer Stone. "I was hot. I'm wanted for a jewel robbery in Detroit" (A. 38, 54). He lectured the police on the training of young officers in searching and marksmanship. (A. 36, 54, 44, 67, 137.) Petitioner gave a detailed oral confession to Captain Pape. (A. 65-67). According to petitioner, he was repeatedly beaten and threatened at this time, the beatings and threats led to his final statement. (Rec. 177.) The allegations of beatings and threats were repeatedly and specifically denied. (Rec. 288-595.)

Petitioner's final statement was given to John Stamos, then an Assistant State's Attorney, and a court reporter. The statement began about 6:45 A.M., just over two hours after arrest. Petitioner asserted at trial that he requested

of Mr. Stamos and Captain Pape the opportunity to consult counsel. (R. 1559, 1480.) Mr. Stamos and Captain Pape denied that requests had been made prior to the giving of the final statement. The testimony of Mr. Stamos reveals that petitioner refused to give the statement because he had told his story four or five times already. (Abst. 60.) When the court reporter arrived, Mr. Stamos began to ask questions and petitioner gave answers. Petitioner indicated his desire to start the statement again. (Abst. 62.) Petitioner claimed that he stated "I will not go any further until I talk to a lawyer" during the first recorded statement, yet the court reporter's transcript conclusively shows the request was not made. (Abst. 49-53, 87) (People's Exhibit 5A).

The transcript of petitioner's complete recorded statement indicates that petitioner was warned of his right to remain silent and had indicated his desire to make a statement. (A. 88-89.) At the end of the statement, petitioner indicated he would sign in the presence of a lawyer. Petitioner asserted he had not been able to make a phone call. Mr. Stamos offered him the immediate opportunity to make a call. Petitioner replied that he would make a call after the statement was typed. (A. 95.) Petitioner made one definite request for counsel after the statement was made. In response petitioner was given a phone and the classified directory. Petitioner then said "forget it". (Abst. 132, 156.)[7] In any event, petitioner refused to sign the statement after he requested counsel. (Rec. 365.) In the interval between the giving of the statement and the time it was typed and prepared for signing, petitioner had slept

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7. It is significant that at trial, defense counsel understood that petitioner's request for counsel was made after the statement was given. (Abst. 183, Rec. 1590.)

several hours and on awaking inquired after the health of Officer Stone, whom he "thought had been merely wounded," and was then informed of his death. (Abst. 143, Rec. 1468.)

The facts surrounding petitioner's statements are fully shown in the record and those facts do not justify any further review of the issue by this or any Court.

V.

THE DECISION OF THE ILLINOIS SUPREME COURT, THAT THE TRIAL COURT WAS CORRECT IN DENYING PETITIONER A HEARING TO PRESENT NEWLY DISCOVERED EVIDENCE, WAS IN ACCORDANCE WITH WELL-SETTLED FEDERAL LAW.

The Illinois Supreme Court held that the trial court was correct in denying petitioner a hearing to present newly discovered evidence, for the reason that the petition failed to show that the "newly-discovered" evidence was conclusive and not merely cumulative. This decision is in accord with federal law, since the federal courts hold that it is incumbent on a party asking for a new hearing to show that:

1) The evidence has been discovered since trial;

2) The petitioner has been diligent in obtaining the allegedly new evidence;

3) The evidence is not merely cumulative or impeaching;

4) The evidence is material;

5) The evidence would probably produce an acquittal.

United States v. *Rutkin*, 208 F. 2d 647, 649, (3rd Cir.

1953), cited as authority in *Mesarosh* v. *United States*, 352 U.S. 1, 9, 10, fn 4 (1956)].

Additionally, the federal courts require that an affidavit of the witness be produced, or its absence accounted for. [*United States* v. *Johnson*, 142 F. 2d 588, 592 (7th Cir. 1944) cited as authority in *Mesarosh* v. *United States*, 352 U.S. 1, 9, 10, fn 4 (1956)].

Since the petition filed by Witherspoon in the trial court failed to meet these standards, which are substantially the same as the state court criteria, the trial court was correct in denying petitioner a new hearing. Accordingly the Illinois Supreme Court's affirmation of that ruling was also correct.

VI.

THERE IS NOT NOW, NOR WAS THERE EVER ANY BONA FIDE DOUBT OF PETITIONER'S COMPETENCY TO STAND TRIAL.

Petitioner's attorneys at trial requested a Behavior Clinic Examination. The examination was had and the psychiatrist at the Clinic concluded that petitioner knew the nature of the charge and was able to cooperate with counsel. (Abst. 42, Rec. 82-85).[8]

The petitioner does not allege that he was incompetent at the time of trial. The only reference to incompetency is found in counsel's motion for a Behavior Clinic Examination. It has been held that the statements of counsel

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8. "Rec." refers to the record of the proceedings below which gave rise to the instant petition.

alone do not, without more, create a *bona fide* doubt of competency. *People* v. *Foley*, 28 Ill. 2d 426, 192 N.E. 2d 850 (1963). The mere fact that counsel requests an examination does not create a bona fide doubt. *People* v. *Cleggett*, 22 Ill. 2d 471, 474, 177 N.E. 2d 187 (1961), *People* v. *Harper*, 31 Ill. 2d 51, 56, 198 N.E. 2d 825, 828 (1964). The question of whether the report was in fact filed in the trial court is irrelevant. Nothing in the report served to raise a *bona fide* doubt of competency.

The federal practice in this regard is enlightening. Under 18 U.S.C. 4244, 63 Stat. 686, upon a showing of reasonable cause, a psychiatric examination may be ordered for a defendant. It is doubtful that petitioner could show even reasonable cause for an examination in federal courts. See *Hawks* v. *Peyton*, 370 F. 2d 123 (4th Cir. 1966). Assuming a federal defendant, like petitioner, is granted an examination, a hearing is required then only if the psychiatrist finds some mental incompetency or insanity. If the psychiatrist reaches a diagnosis that defendant is competent, no hearing is required. *Hereden* v. *United States*, 286 F. 2d 526 (10th Cir. 1961). *Cf. Whalem* v. *United States*, 346 F. 2d 812, 815 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 836, *reh'g. denied*, 382 U.S. 912. It is clear that under federal law, petitioner could not claim that he was entitled to a hearing.

In this case, petitioner asked for an examination; he received it and was diagnosed as competent. The question of his competency was never again raised. No evidence tending to show incompetency was offered either then or now, no claim of incompetency was ever made either then or now, no hearing as to competency was ever requested before, during or immediately after trial. If it is constitutionally required under these circumstances that a trial

judge *sua sponte* order a competency hearing, then all the prevailing State and Federal law is unconstitutional.

VII.

THE ILLINOIS PRACTICE OF ALLOWING IMPEACHMENT OF A DEFENDANT WHO TESTIFIES, BY PROVING THAT THE DEFENDANT HAS BEEN PREVIOUSLY CONVICTED OF AN INFAMOUS CRIME, IS IN ACCORD WITH WELL-ESTABLISHED PRINCIPLES OF BOTH FEDERAL AND STATE LAW, AND NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS RAISED BY THE ILLINOIS SUPREME COURT'S APPROVAL OF SUCH A PRACTICE.

The petitioner notes that at trial, after he had taken the stand to testify in his own defense, the State introduced proof that he had been previously convicted of a statutorily defined "infamous crime." Petitioner argues that the Illinois statute which authorizes the State to so impeach his credibility violates his rights under the Due Process clause, in that it penalizes him for exercising his constitutional right to testify in his own behalf. This contention is without substantial merit and should not provide a basis for grant of certiorari.

No useful purpose would be served by citing the innumerable cases, both federal and state, where substantially the same practice was followed in a trial court with a subsequent denial of certiorari in this Court. It is perhaps sufficient to note that in a recent case this Court commented that evidence of past crimes could be admitted "when the defendant has testified and the State seeks to impeach his credibility." [*Spencer* v. *Texas*, 87 S

Ct. 648, 652 (1967)] This Court also recognized that the Texas cases cited for that proposition "reflect the rules prevailing in nearly all common-law jurisdictions." [87 S. Ct. at 652 fn 7]. The respondents herein do not rely on the magnitude of the practice, but rather on the fact that it is not fundamentally unfair to introduce evidence relating to a defendant-witness' credibility. And as long as the State criminal procedure does not deny petitioner a constitutionally fair trial, this Court has not in the past interferred with what are essentially matters of State concern. While the *Spencer* case is perhaps not as closely on point as numerous other federal or state court cases, the respondents would point out one brief comment which they feel is governing here.

> "But it has never been thought that such cases [holding that Due Process guarantees a fundamentally fair criminal trial] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority." [87 S. Ct. at 653, 654.]

The respondents submit that review of this Illinois criminal procedure, by grant of certiorari, is neither warranted nor necessary.

CONCLUSION

For the foregoing reasons the respondents ask that the petition for certiorari be denied.

Respectfully submitted,

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FEB 28 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON,

PETITIONER,

v.

STATE OF ILLINOIS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

No. 1016

WAYNE DARNELL BUMPER,

PETITIONER,

v.

STATE OF NORTH CAROLINA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION OF F. LEE BAILEY TO FILE BRIEF ON THE MERITS AS AMICUS CURIAE

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MOTION OF F. LEE BAILEY TO FILE BRIEF ON THE MERITS AS AMICUS CURIAE

Attorney F. Lee Bailey hereby respectfully moves for leave to file a brief *Amicus Curiae* in these cases. The

consent of the attorneys for the respective petitioners has been obtained, and is attached. The consent of the attorneys for the respective respondent-governments was requested but was not given.

The interest of Attorney F. Lee Bailey in these cases arises from the fact that he is counsel to defendants in two cases presently pending in state appellate courts in which the same issue is before the court, namely, whether a State's exclusion from a jury of persons opposed to or with conscientious scruples against capital punishment violates the Sixth and Fourteenth Amendments to the United States Constitution. *Commonwealth* v. *George H. Nassar,* #13995, Supreme Judicial Court, Massachusetts; *Carl Coppolino* v. *State of Florida,* #67-193, Florida Appellate 2. In each of those cases, the defendant was not given the death sentence, although his jury was "qualified" on capital punishment. A more general interest of Attorney Bailey in the cases before this Court arises from the fact that he is a member of the criminal bar, specializing in capital cases, having represented the defendants in over 20 homicide cases, and is therefore greatly concerned with the administration of justice in capital cases.

In the instant case of *Witherspoon* v. *Illinois,* No. 1015, petitioner was sentenced to death in the state trial court, and in the courts below petitioner argued primarily that he had been prejudiced by the State's procedure for jury selection by having received the death sentence. Since it is likely that petitioner may pursue the same course in this court, it it believed that a brief which *Amicus Curiae* is requesting permission to file will contain a more complete argument on the Constitutional issue before this Court, as to whether it is unconstitutional to exclude from a jury persons opposed to capital punishment when the defendant will not or does not get the death sentence.

In the instant case of *Bumper* v. *No. Carolina,* No. 1016, petitioner, in the courts below, on direct appeal, argued the constitutional issue regarding jury selection in capital cases, but did not mention the issue of whether or not a holding in his favor on this issue should be given retrospective effect. Since it is likely that petitioner may pursue the same course in this court, it is believed that the brief which *Amicus Curiae* is requesting permission to file will contain a more complete argument on whether a holding in petitioner's favor in this case should be given retrospective effect.

Respectfully submitted,

F. Lee Bailey, Esquire
40 Court Street
Boston, Mass.
February 23, 1968

Certificate of Service

I, F. Lee Bailey, Esq., 40 Court Street, Boston, Massachusetts, hereby certify that I have air mailed, postage prepaid, pursuant to Rule 33(1) Rules of the Supreme Court of the United States, this motion to the counsel of record in the above entitled cases, this ——— day of February, 1968.

F. Lee Bailey

SUPREME COURT, U. S.

MAR 1

JOHN F. DAVIS

No. 1015

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

BRIEF OF THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE

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Lavinsky, "Executive Clemency", 42 Chi-Kent L.Rev. 13, 39 (1965) 28

Louis Harris & Associates Poll (July, 1966) 17, 18

Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?", 39 Tex.L.Rev. 545 (1961) 30, 31, 32, 36, 37, 39, 40

II Polls, No. 3 (Spring, 1967) 13

Zeisel, "Some Insights Into the Operation of Criminal Juries", (1957) 34-6

Additional authorities on the lack of standards for the jury in imposing the death penalty are found in footnote on page 21.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

BRIEF OF THE ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE

Now comes the Illinois Division of the American Civil Liberties Union, by its attorney, Elmer Gertz, and pursuant to leave of court granted January 15, 1968, files the within brief as amicus curiae.

THE INTEREST OF AMICUS CURIAE ARISES FROM THE FACT THAT EVERY ASPECT OF CAPITAL PUNISHMENT, INCLUDING THE CHALLENGE OF JURORS, IS A CIVIL LIBERTIES ISSUE.

The American Civil Liberties Union is an organization dedicated to the preservation of a free and open society, principally through the protections embodied in the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States. The Illinois Division is one

of the larger constituent bodies and shares with the national organization its concern for constitutional liberties.

It is probably because of the activities of the Illinois Division that the American Civil Liberties Union has taken the position in recent years that capital punishment is a civil liberties issue. The process by which the Illinois Division and the national organization reached this conclusion should be examined in the light of the argument hereinafter advanced.

Even with the limitations of the issue by this Court, capital punishment must be examined, not as if it were one among many punishments society chooses to impose upon its offenders, but one awful in contemplation and irrevocable in result. In Illinois in this Twentieth Century, there have been at least four verified cases of innocent persons being convicted of murder. Lloyd Eldon Miller was within seven hours of execution, a reprieve having been refused by the Governor and the State Supreme Court.

In March, 1965, a special committee of the Illinois Division presented to the Board a survey of murder and capital punishment in Illinois, which was the result of much effort by many persons. (It is available only in manuscript form.) *Immutable Judgment: Murder and Capital Punishment In Illinois—A Survey. (March, 1965)*

Willard J. Lassers, the Chairman of the committee, is the attorney who subsequently appeared before this Court in behalf of Lloyd Eldon Miller. (*Miller* v. *Pate,* 386 U.S. 1, 87 S. Ct. 785 (1967). The committee enlisted the aid of both proponents and opponents of capital punishment, including Virgil Peterson, Operating Director of the Chicago Crime Commission; the Honorable John S. Boyle, Chief Justice of the Circuit Court of Cook County and a former State's Attorney of Cook County; Benjamin

Adamowski, another former State's Attorney of Cook County; Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation; Chicago Superintendent of Police O. W. Wilson, and others. The committee studied every reported Illinois murder case for the period between 1950 and 1963 in which death sentences were imposed, including those eleven cases in which the sentence was actually carried out and those in which another result ensued. (There have been no executions in Illinois since August, 1962, but twenty persons are presently under sentence of death.) In addition, the Committee examined by a special process of selection, fifty cases of individuals tried for murder in Illinois whose cases were reviewed by the Supreme Court of Illinois from January 1, 1950 to the summer of 1964. These were cases in which the death sentence had not been imposed. The findings of the committee, as stated in the report, which led amicus to take the stand it urges herein, are summarized in Appendix "A" to this brief.

For the reasons cited in this report, and others, the Illinois Division of the American Civil Liberties Union concluded that the death penalty is a civil liberties issue and after due deliberation the National Board of the American Civil Liberties Union concurred. The issue to be considered herein must be viewed in the context of what has been said about the A.C.L.U. viewpoint.

SUMMARY OF THE ARGUMENT

All studies which have been made show that the people of this country are steadily becoming more and more opposed to the death penalty. The President's Commission on Law Enforcement and Administration of Justice concluded, in 1967, all members agreeing, that the present

situation in the administration of the death penalty in many States is intolerable. A report of the Department of Economic and Social Affairs of the United Nations finds that in this country the death penalty is imposed upon members of racial and religious minorities with a frequency out of proportion to the capital crimes committed by members of such minorities. This report further finds that the death penalty is not a deterrent to the commission of murder, and a large majority of the leading authorities in the penal and social sciences favor the abolition of capital punishment.

Every reliable poll of public opinion in the United States shows a marked decline of those in favor of the death penalty, with a resultant increase in those who definitely oppose this penalty, an increasing majority. These polls further indicate that those who are most likely to understand the defendant charged with murder are those who are opposed to the death penalty and thus excluded from serving upon his jury.

Illinois and every other state where the death penalty is not mandatory leaves it to the unfettered discretion of the jury to determine when the death penalty is appropriate. The courts flatly refuse to give the jury any guidelines to follow in capital cases, due to the fact that the courts themselves are given no guidelines in making this determination. All that the court may instruct the jury is that they have complete discretion in deciding upon the penalty to be inflicted. The discretion of the jury or trial court judge will not be reviewed upon appeal unless it clearly shows a great departure from the spirit of the law or that the penalty is manifestly out of proportion to the nature of the offense.

In Illinois, as elsewhere, the Governor is given the exclusive power, by the State Constitution, to commute sen-

tences. As in the case with jurors and judges in imposing penalties, no standards are given to the Governor to guide him in making this determination. Again, he has complete discretion to take into account or reject any elements which he wishes. Thus, executive clemency is a matter of grace which may turn upon any one of a number of fortuitous circumstances. There are no procedural or substantive safeguards to the condemned, and no appeal.

The effect of disqualifying from the jury those with scruples against the death penalty is to deprive the defendant of a fair trial on the issue of guilt. This disqualification arose at a time when conviction meant automatic death. While this harsh result has been abandoned in almost all jurisdictions, the correlative challenge for cause, now outmoded and illogical on the issue of guilt, has been retained.

It has been established that those persons who have no scruples against the death penalty are biased in favor of the prosecution, thus stacking the deck against the accused in the one situation where he has the most to lose. This exclusion of over half of the population precludes the defendant from having his case heard by a cross-section of the community, depriving him of due process of law and an impartial jury.

This is a situation inherently prejudicial to a defendant charged with a capital crime, for which no actual prejudice need be shown.

I.

THE ISSUE AS FRAMED BY THIS COURT MUST BE CONSIDERED IN THE CONTEXT OF THE FACT THAT THE DEATH PENALTY IS WITHERING AWAY EVERYWHERE, EXCEPT IN AUTHORITARIAN COUNTRIES WHERE IT IS USED FOR POLITICAL AND ECONOMIC PURPOSES RATHER THAN FOR MURDER.

On July 23, 1965, President Lyndon B. Johnson established a Commission on Law Enforcement and Administration of Justice, through Executive Order 11236. The Commission had a distinguished membership (pp. 309-311 of its report) and a large staff and it consulted with many persons and agencies having special knowledge (pp. 311-326 of report). It received, as it said, the unstinting assistance of the Federal Bureau of Investigation, the United States Bureau of Prisons, the Department of Health, Education and Welfare, and every other Federal agency it called upon. It, also, had the invaluable assistance of many State, local, and private agencies and groups. It thus had at its service the special talent and knowledge of hundreds of expert consultants and advisers. It issued its report in February, 1967, under the title, *The Challenge of Crime in a Free Society*. One page, 143, in the report sums up the prevailing situation with respect to capital punishment:

> "As the abolition or the retention of the death penalty is being widely debated in the States, it is appropriate to point out several aspects of its administration that bear on the issue.
>
> "The most salient characteristic of capital punishment is that it is infrequently applied. During 1966 only 1 person was executed in the United States; the trend over the last 36 years shows a continual decline in the number of executions, from a high of 200 in

1935 to last year's low of one. Furthermore, all available data indicate that judges, juries, and governors are becoming increasingly reluctant to impose, or authorize the carrying out of a death sentence. Only 67 persons were sentenced to death by the courts in 1965, a decline of 31 from the previous year, and 62 prisoners were reprieved from their death sentences. In a few States in which the death penalty exists on the statute books, there has not been an execution in decades.

"The decline in the application of the death penalty parallels a substantial decline in public support for capital punishment. The most recent Gallup Poll, conducted in 1966, revealed that less than half of those interviewed favored retaining the death penalty. In the last 3 years, 5 states either totally abolished capital punishment or severely limited its use, thus bringing to 13 the number of States which have effectively repealed capital punishment. Great Britain experimentally suspended the death penalty for 5 years in 1965. The trend toward abolition has not been uniform, however. Capital punishment was abolished in Delaware in 1958 but restored in 1961. And in 1966 a constitutional amendment abolishing capital punishment was rejected by the voters in Colorado. In 1965 the Canadian Parliament rejected a move to abolish the death sentence.*

"It is impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes. The most complete study on the subject, based on a comparison of homicide rates in capital and non-capital jurisdictions, concluded that there is no discernible correlation between the availability of the death penalty and the homicide rate. This study also revealed that there was no significant difference between the two kinds of States in the safety of policemen. Another study of 27 States indicated that

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* Subsequently, Canada abolished the death sentence.

the availability of the death sentence had no effect on the rate of assaults and murders of prison guards.

"Whatever views one may have on the efficacy of the death penalty as a deterrent, it clearly has an undesirable impact on the administration of criminal justice. Capital cases take longer to litigate at the trial level; the selection of a jury often requires several days, and each objection or point of law requires inordinate deliberation because of the irreversible consequences of error. In addition, the inherent sensationalism of a trial for life distorts the factfinding process and increases the danger that public sentiment will be aroused for the defendant, regardless of his guilt of the crime charged. This distortion is not restricted to the trial level. As Mr. Justice Jackson noted: 'When the penalty is death * * * [appellate] judges are tempted to strain the evidence and even in close cases, the law, in order to give a doubtfully condemned man another chance.'

"Furthermore, the imposition of a death sentence is but the first stage of a protracted process of appeals, collateral attacks, and petitions for executive clemency. At the end of 1965 there were 331 prisoners awaiting execution in the United States, and since then this number undoubtedly has increased. These prisoners then were under sentence for an average of 30.8 months, and the average time between imposition and execution was almost 4 years. The spectacle of men living on death row for years while their lawyers pursue appellate and collateral remedies tarnishes our image of humane and expeditious justice. But no one seriously proposes to limit the right of a condemned man to have errors at his trial corrected or to obtain the mercy of the executive.

"Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.

"Some members of the Commission favor the abolition of capital punishment, while other members favor its retention. Some would support its abolition if more adequate safeguards against the release of dangerous offenders were devised. All members of the Commission agree that the present situation in the administration of the death penalty in many States is intolerable for the reasons stated above."

The Department of Economic and Social Affairs of the United Nations supports these findings of the President's Commission in its 1967 publication, *Capital Punishment—Developments 1961-1965.*

A few pertinent excerpts follow. First a summary of the basic findings (pp. 3-4):

"(*a*) There is an over-all tendency in the world towards fewer executions. This is the result of less frequent use of the death penalty in those States whose statutes provide for that penalty, and of a steady movement towards legislative abolition of capital punishment.

(*b*) There is a slight but perceptible contrary tendency in the world towards legislative provision for and actual application of the death penalty for certain economic and political crimes.

(*c*) Where it is used, capital punishment is increasingly a discretionary rather than a mandatory sanction.

(*d*) Almost all countries have provision for the exclusion of certain offenders from capital punishment because of their mental and physical condition, extenuating circumstances, age and sex; the scope of the categories of offenders thus exempted is broadening.

(*e*) A growing number of offenders who are sentenced to death are spared through judicial processes or by exclusive clemency.

(*f*) There is a great disparity between the legal provisions for capital punishment and the actual application of those provisions.

(*g*) With increasing frequency, an offender who is sentenced to death is confined, while awaiting execution, in conditions similar to those of other prisoners. Execution, if it takes place, is likely to be accomplished by shooting or hanging and accompanied by a minimum of publicity.

(*h*) The tendency with regard to offenders who are subject to capital punishment but who have been accorded another penalty is to confine them in conditions similar to those of other prisoners and to provide mechanisms for their eventual release.

(*i*) With respect to the influence of the abolition of capital punishment upon the incidence of murder, all of the available data suggest that where the murder rate is increasing, abolition does not appear to hasten the increase; where the rate is decreasing, abolition does not appear to interrupt the decrease; where the rate is stable, the presence of or absence of capital punishment does not appear to affect it."

Then, at p. 20, the report underscores what is generally regarded as established with respect to the uneven application of the death penalty:

"Whether members of minority groups—racial, religious, caste or class—are discriminated against, either in terms of the proportion of death sentences received to the number of capital crimes committed or in terms of the proportion of actual executions to the number of death sentences received, is an important but difficult question and was a subject of some comment in the Economic and Social Council's debates on the Ancel report. Although the data are rare, there is evidence that, in the United States of America and undoubtedly elsewhere, the death penalty is imposed

upon members of racial and religious minorities with a frequency out of proportion to the capital crimes committed by members of such minorities."

With respect to the alleged deterrent value of the death penalty, the report says, at p. 39:

"Examination of the number of murders committed before and after the abolition or reintroduction of the death penalty does not support the theory that capital punishment has a unique deterrent effect. Nowhere has abolition been followed by an otherwise inexplicable rise in the murder rate; nowhere has reintroduction been followed by an otherwise inexplicable decline in the murder rate."

And, again, at pp. 39-40:

"Comparison of the murder rates of abolitionist and retentionist jurisdictions which are geographically, economically, and culturally similar also fails to demonstrate that capital punishment has a deterrent effect superior to that of lengthy imprisonment. Differences among countries frequently make comparison difficult, but where similar jurisdictions can be compared, the murder rates of abolitionist jurisdictions are indistinguishable from those of retentionist jurisdictions. Owing to the relative similarity of cultural, geographic, and economic factors, the experience of certain states of the United States of America is particularly instructive in this regard. The homicide rate of Maine (abolitionist) is very similar to those of New Hampshire and Vermont (retentionist); the homicide rate during the abolitionist period of Kansas was somewhat lower than those of the retentionist states of Colorado and Missouri. From 1950 to 1964 the average homicide rate per 100,000 population in Illinois (retentionist) was 5.3; for that same period in neighboring Michigan (abolitionist), the rate was 4.0. While comparison between nations is more difficult, all the available data suggest that the absence of the death penalty does not affect the homicide rate."

And, finally, on p. 40:

> "Information concerning the effect of capital punishment on the rate of killings of police is similarly limited. None of the presently available data indicates any correlation between the rate of killings of police and the presence or absence of capital punishment."

As to the viewpoint of experts on the subject, the report says, at p. 46: "Among leading authorities in the penal and social sciences, the large majority favours the abolition of capital punishment."

There is a growing literature on the death penalty. Almost without exception, the best minds of our age favor abolition of capital punishment. There are classical studies by Arthur Koestler (*Reflections in Hanging,* Macmillan, 1957) and Albert Camus (*Reflections on the Guillotine,* Knopf, 1961). The matter has been epitomized by James Avery Joyce, a British lawyer and economist connected with the United Nations. In his book, *Capital Punishment* (Nelson, 1961), he says, at pp. 265-266:

> "The rejection of violence as a way of 'life' both for the individual and the nation, has thus become the essential condition of our emergent One World civilization. Unless he can collectively repudiate and replace violence as a means of achieving both social and national defense, Man's continued stay on Planet Earth is open to grave doubt. The issue is as simple as that.
>
> "Because of this fact, the problem of Capital Punishment—already an affront to the individual consciences of millions and millions of ordinary individuals across the earth—has moved into the center of world affairs as the touchstone of human survival itself. That is where we began this book and that is where we end it.
>
> "If, within the United Nations and within each separate nation, the problem of Capital Punishment can

be resolved in terms of the rights of and the dignity due to the living creature whom we call 'Man', there is a real hope for peace and the consequential adjustments in international attitudes which a workable world order requires.

• • •

"The bloody garment of violence covering our common nakedness is too horrible to be mistaken. The hangmen and the missile-men are all of a piece with a doomed society that bases its social defense on the gibbet and gas chamber and its national defense on the launching-pad and Strontium-90. Yet, across the earth, as it has been one of the purposes of these pages to record, men of sense and vision are joining with the Mumfords and Schweitzers and Tagawas and Hammarskjolds to tear down this evil pattern of violence before it becomes humanity's shroud."

II.

THE DISQUALIFICATION OR CHALLENGE OF JURORS BECAUSE OF SCRUPLES AGAINST THE DEATH PENALTY IS UNCONSTITUTIONAL SINCE A SUBSTANTIAL AND GROWING SEGMENT OF ALL AMERICANS, PERHAPS A MAJORITY, IS OPPOSED TO THE DEATH PENALTY.

So far as we have been able to ascertain after diligent search, every reliable poll of public opinion in the United States establishes conclusively that more Americans are now opposed to the death penalty for persons convicted of murder than favor it. Year by year the margin of opposition to the death penalty has increased. The pertinent data appears, among other places, on p. 84 of the Spring 1967 issue of *Polls* (Vol. II, No. 3), "The International Review on Public Opinion" (George Gallup, the best known of American gaugers of public opinion, is a member of the Editorial Board). It appears that, in 1966, 47% opposed the death penalty for murder, while 42% favored

it, and 11% had no opinion. The previous year, in 1965, 45% had favored the death penalty for murder, while 43% were opposed, and 12% had no opinion. In 1960, a majority, 51%, had favored, 36% had opposed, and 13% had no opinion. In 1953, 68% had favored, 25% opposed, and 7% had no opinion. Even in the earlier period when there was the most support for the death penalty, the segment of the population opposed to it was a considerable one (25%). Now it is apparent that as more polls are taken, the American public will register itself increasingly as opposed to the extreme and absolute penalty for murder.

The Gallup Political Index, Report No. 13, June, 1966, at p. 16, analyses the results of the poll of June, 1966, by sex, race, education and other relevant circumstances, as follows. With respect to these results, Gallup International (the copyright holder) observes:

> "*The Sample*: The sampling procedure of the Gallup Poll is designed to produce samples which are representative of the U. S. civilian adult population. National survey results are based on interviews with a minimum of 1,500 adults.
>
> "*Sampling Tolerances*: In interpreting survey results, it should be borne in mind that all sample surveys are subject to sampling error, that is, the extent to which the results may differ from what would be obtained if the whole population had been interviewed. Samples of 1,500 have a tolerance within 3 to 4 percentage points 95 per cent of the time.
>
> "Certain population groups are not reported separately for many surveys because the number of persons in the sample is not enough to provide sufficiently accurate results. An 'x' has been used in the Gallup Political Index to designate such groups."
>
> Question: "Are you in favor of the death penalty for persons convicted of murder?"

	June, 1966		
	Yes, in Favor	No	No Opinion
	%	%	%
National	42	47	11
Sex			
Men	47	45	8
Women	38	49	13
Race			
White	44	46	10
Non-white	x	x	x
Education			
College	46	46	8
High School	41	48	11
Grade School	42	46	12
Occupation			
Prof. & Bus.	43	48	9
White Collar	57	30	13
Farmers	40	44	16
Manual	40	50	10
Age			
21-29 years	40	50	10
30-49 years	43	45	12
50 & Over	43	47	10
Religion			
Protestant	42	48	10
Catholic	44	45	11
Jewish	x	x	x
Politics			
Republican	51	40	9
Democrat	39	51	10
Independent	41	48	11
Region			
East	45	43	12
Midwest	42	48	10
South	35	53	12
West	50	42	8

Income			
$7,000 & over	45	47	8
$5,000-$6,999	41	50	9
$3,000-$4,999	42	40	18
Under $3,000	40	50	10
Community Size			
500,000 & over	43	43	14
50,000-499,999	43	49	8
2,500-49,999	47	44	9
Under 2,500, Rural	39	51	10

By way of a check on the Gallup Poll, we give the results of another poll. Elmo Roper & Associates, another highly reputable agency for measuring public opinion on issues troubling the American people, show somewhat similar groupings on the death penalty. One of their most recent releases on the subject was dated February 9, 1958. (This within months of the commission of the Witherspoon offense.) They phrased the issue as follows:

> "Certain states have abolished the death sentence. Do you think people who have been convicted of the worst crimes, like murder, should be executed, or do you think the heaviest penalty given anyone should be life imprisonment?"

The result:

"For death sentence	—	42%
Against death sentence	—	50%
Express no opinion	—	8%

They commented further:

> "Opposition to the death penalty is strongest among the lower economic groups. Fifty-three per cent at the lowest economic levels oppose it, while its opponents among the higher economic levels are only 42 per cent. The charge has been made that it is the poor and friendless who most often pay the ultimate penalty. A feeling that the better off have a chance

at justice may underlie the attitudes of the lower income groups. This sense of unequal justice may also influence the thinking of Negroes, 78 per cent of whom are opposed to capital punishment. . . .

"Since the United States is basically a strongly humanitarian country, public feeling seems to be turning against the horror of the execution chamber. In a world where death is in far too abundant supply, more and more people are finding it difficult to believe that even legal killing can ever serve the cause of justice and a good society."

One aspect of public opinion has been stressed by Roper more than the other pollsters. It is that in 1958, 52% of the Protestants of this country were opposed to the death penalty, and the percentage has undoubtedly risen as one Protestant denomination after the other has committed itself to opposition to the death penalty. Since the overwhelming majority of this country is Protestant, it would appear that a growing majority, certainly a very sizeable proportion of the population, is being barred from participation in juries in murder cases. This, it seems to us, is unconstitutional in and of itself.

Yet a third poll confirms these observations. In July, 1966, Louis Harris and Associates, Inc., conducted a poll on the attitude of the public concerning crime and criminality in general. One of the questions asked was:

"Some states have abolished capital punishment—executing persons who commit a murder—and have substituted life imprisonment instead. Do you favor or oppose capital punishment?"

The replies to this question were very similar to the results obtained by Gallup and Roper:

	Favor	Oppose	Not sure
	%	%	%
Nationwide	38	47	15
By education			
8th grade or less	32	52	16
High school	28	46	16
College	44	44	12
By size of place			
Cities	37	46	17
Suburbs	48	37	15
Towns	30	56	14
Rural	33	52	15
By sex			
Men	44	43	13
Women	31	51	18

Mr. Harris commented upon these results as follows:

"It is surprising that the less well-educated, more rural and small town resident—women especially—carry the day against capital punishment. The more affluent parts of society, especially among men and suburban dwellers, are more in favor of continuing capital punishment."

• • •

"By 7 to 1, people think prisons should be more corrective than punitive, with heavy emphasis on rehabilitating criminals to re-enter society.

"By 4 to 3, most Americans reach the same conclusion about capital punishment that the Justice Department has."

This poll and the comments thereon indicate that the large majority of persons in this country feel that the purpose of the law is to rehabilitate, rather than punish. Of

course, the death penalty is the very antithesis of rehabilitation.

What is particularly evident in the results of these polls is that the opposition to the death penalty in this country pervades the entire fabric of our society. The total figures showing opposition to the death penalty in our country are not the result of a large imbalance of views in one particular element or area in the country. Whether man or woman, college or elementary school graduate, white collar or blue, metropolitan resident or farmer, easterner or westerner, the opposition to the death penalty is increasingly large. By disqualifying these people from serving on the jury, the Sixth and Fourteenth Amendments are violated.

III.

THE CHALLENGE FOR CAUSE OF JURORS HAVING SCRUPLES AGAINST THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE THERE ARE NO LEGISLATIVE OR JUDICIAL GUIDELINES OR STANDARDS BY WHICH TO ASSESS THE DEATH PENALTY, SUCH JURY IS NOT A TRUE CROSS-SECTION OF THE COMMUNITY, AND A DEATH-QUALIFIED JURY IS PROSECUTION PRONE.

Ill. Rev. Stat. ch. 38 sec. 9-1 (1967) defines the offense of murder and lists the possible penalties as death or imprisonment in the penitentiary for an indeterminate term with a minimum of not less than 14 years. If the defendant is found guilty, a death sentence shall not be imposed unless the jury's verdict so provides in accordance with section 1-7 (c) (1) of ch. 38:

> "Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the Court may sentence

> the offender to death or imprisonment. Where such verdict is not returned by the jury, the Court shall sentence the offender to imprisonment."

While the statute requires the explicit agreement of jury and court, no standard is provided for either by which they can determine if the death penalty is proper.* As was stated by the Illinois Supreme Court in *People* v. *Bernette*, 30 Ill. 2d 359, 197 N. E. 2d 463 (1964): "The jury . . . was free to select or reject as it saw fit." Id. at 370.

Ill. Rev. Stat. ch. 38 sec. 1-7 (a)(1967) does provide that the Court may hear evidence in mitigation before deciding if death is proper. Such evidence may concern the "moral character, life, family, occupation, and criminal record of the offender." But nowhere in this statute does a standard appear by which the jury or judge can assess these very vague "mitigating circumstances."

Illinois is not alone in allowing the jury unfettered discretion in deciding whether to impose the death penalty or not. All state legislatures which have not abolished the death penalty have left it the complete discretion of

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* While this is the present situation in Illinois, the law at the time Witherspoon was convicted provided no check upon the jury by giving the judge discretion in sentencing one convicted of murder. The sentence was fixed by the jury alone:

> "Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court."

Ch. 38, § 360, Ill. Rev. Stat. 1959. Then, as now, no guidelines were given the jury in making this awesome decision.

the jury.* There are no explicit standards which can guide the jury. As Kalven and Zeisel state: "The discretion which the jury in the United States is asked to exercise is, it should be emphasized, striking: there is neither rule nor standard to guide it . . ." Kalven and Zeisel, "The American Jury and the Death Penalty," 33 U. Chi. L. Rev. 769, 770 (1966).

New York has limited capital punishment to murder of a police officer or prison guard, N. Y. Penal Code sec. 1045, but even as so limited the jury has complete discretion in deciding whether to impose the death penalty within this class of murders. Some states have classified mur-

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* Ala. Code tit. 14, sec. 318 (1940); Ariz. Rev. Stat. sec. 13-453 (1956); Ark. Stat. Ann. secs. 41-2227, 43-2153 (1947); Cal. Pen. Code sec. 190 (1955); Colo. Rev. Stat. ch. 40, art. 2-3 (1963); Conn. Sta. Ann. sec. 53-10 (1958); Dela. Code Ann. tit. 11, sec. 571 (1953); Fla. Stat. secs. 782.04, 919.23 (1951); Ga. Code Ann. sec. 26-1005 (1953); Idaho Code sec. 18-4004 (1947); Ill. Rev. Stat. ch. 38, secs. 9-1, 1-7(c)(1) (1967); Ind. Ann. Stat. secs. 10-3401, 9-1819 (Burns 1956); Kan. Stat. Ann. sec. 21-403 (1964); Ky. Rev. Stat. secs. 431.130, 435.010 (1948); La. Rev. Stat. tit. 14, sec. 30, tit. 15, sec. 409 (1950); Md. Ann. Stat. Art. 27, sec. 413 (1957); Miss. Code Ann. sec. 2217 (1942); Mo. Stat. Ann. sec. 559.030 (1949); Mont. Rev. Code Ann. sec. 94-2505 (1947); Neb. Rev. Stat. sec. 28-401 (1943); Nev. Rev. Stat. sec. 200.030 (1963); N.H. Rev. Stat. Ann. sec. 585:4 (1955); N.J. Stat. Ann. tit. 2A, ch. 113, sec. 4 (1953); N.M. Stat. Ann. ch. 40A, sec. 29-2 (1953); N.Y. Penal Code sec. 1045; N.C. Gen. Stat. sec. 14-17 (1953); Ohio Rev. Code tit. 29, sec. 2901.01 (1964); Okla. Stat. Ann. tit. 21, sec. 707 (1951); Pa. Stat. Ann. tit. 18, sec. 4701 (Purdon 1963); S.C. Code of Laws tit. 16, sec. 16-52 (1962); Tenn. Code Ann. sec. 39-2405 (1955); Tex. Pen. Code art. 1257 (1961); Wash. Rev. Code. Ann. tit. 9, sec. 9.48.030 (1961); Wyo. Stat. Ann. sec. 6-54; Mass. Laws Ann. ch. 265, sec. 2 (1956); S.D. Code of 1939 (1960 Supp) Ch. 13.20, sec. 13.2012 (1960); Utah Code Ann. tit. 76, sec. 76-30-4 (1953); Vt. Stat. Ann. tit. 13, sec. 2303 (1959).

der by "degrees." But within the highest degree which is punishable by death the jury has no statutory or judicial standard by which it can guide itself. e.g. Ala. Code tit. 14, secs. 314, 318 (1940); Idaho Code secs. 18-4003, 18-4004 (1947); Ind. Stat. Ann. sec. 10-3401 (1956); Mo. Stat. Ann. sec. 559.030; Pa. Stat. Ann. tit. 18, sec. 4701 (Purdon 1963).

It thus appears that the jury is given no statutory or judicial guides. What type of instructions must be given to the jury by the Courts to guide them? There are no Illinois cases on this point but it seems well established in other courts that all that is required is that the trial court must instruct the jury that it has discretion to decide what penalty should be imposed. Failure to so instruct would be reversible error. *Smith* v. *State,* 205 Ark. 1075, 172 S.W. 2d 248 (1943); *State* v. *Wilson,* 151 Iowa 698, 141 N.W. 337 (1913); *State* v. *Christensen,* 166 Kan. 152, 199 P. 2d 475 (1948); *Commonwealth* v. *Madaffer,* 291 Pa. 270, 139 Atl. 875 (1927); *Marshall* v. *State,* 33 Tex. 664 (1871); *Bradshaw* v. *Commonwealth,* 174 Va. 391, 4 S.E. 2d 752 (1939); *State* v. *Chaney,* 117 W. Va. 605, 186 S.E 607 (1936). It is obvious that telling the jury that they have discretion is doing no more than repeating a statute which is itself standardless. It has in fact been held that merely reading or quoting to the jury the statute which grants them discretion is sufficient. *Hernandez* v. *State,* 43 Ariz 424, 32 P. 2d 18 (1934); *Howell* v. *State,* 102 Ohio 411, 131 N.E. 706 (1921).

Assuming that the jury finds the defendant guilty and imposes the death penalty and assuming that the trial judge concurs, what avenues are open to the defendant on appeal? Ill. Rev. Stat. ch. 110A, sec. 615(b)(3) and (4) gives the reviewing court power to reduce the punish-

ment imposed by the trial court.* The statute gives no guidelines to the reviewing court by which to judge the lower court's decision on the penalty.

The Illinois Supreme Court has taken a very limited view of its power under this provision. In *People* v. *Smith*, 14 Ill. 2d 95, 97, 150 N.E. 2d 815 (1958), the Court said a reviewing court should not upset the sentence unless it *clearly appears* that the penalty constitutes a great departure from the spirit of the law or that the penalty is *manifestly in excess* of the prescription of Sec. 2, Art. II of Illinois Constitution which requires penalties to be proportioned to the nature of the offense. In *People* v. *Taylor*, 33 Ill. 2d 417, 211 N.E. 2d 673 (1965) the Court admonished itself to proceed with caution and circumspection in reducing sentences. The trial judge, it observed, has superior opportunity to make a sound determination concerning the punishment to be imposed. In *People* v. *Bonner*, 37 Ill. 2d 553, 229 N.E. 2d 527 (1967) the Court stated that the imposition of sentence was a matter of judicial discretion, and in absence of *manifest abuse* of that discretion it will not be altered by reviewing court. Although these cases were non-capital cases, they demonstrate the reluctance of a reviewing court in Illinois to reduce the penalty imposed by the trial court even though reviewing courts are given that power by statute.

People v. *Dukes*, 12 Ill. 2d 334, 146 N.E. 2d 14 (1957) was a capital case. The Court said that where the charge is murder, a jury has wide discretion in fixing the punishment. It went on to say when the jury in the exercise of

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* This avenue of appeal was not open to petitioner Witherspoon. This power was given to the courts of review for the first time in 1963. (Ch. 38 §121-9(b)(3) and (4), Ill. Rev. Stats 1963)

that discretion inflicts the death penalty, it could not affirm the judgment even though proof of guilt is clear, if prejudicial error occurred in the trial. This seems to give the defendant some protection; but it is protection only from the possibility that the jury may have decided to impose the death penalty because of the prejudicial error. If there were no prejudicial errors, the reviewing court in Illinois would defer to the "wide discretion" of the jury and would not change the penalty. A case in which the Court said it would not reduce the death penalty is *People v Meyers*, 35 Ill. 2d 311, 220 N.E. 2d 297 (1966) *cert. den.* 87 S. Ct. 752, 385 U.S. 1019, 17 L. Ed. 2d 557. The Court characterized the crime as "brutal" and "atrocious" and would not reduce the penalty. Of course, there are no nice murders.

A great number of state courts hold that the jury's determination of punishment cannot be reviewed when the only error claimed is the jury's abuse of discretion. *Catalina* v. *People*, 104 Colo. 585, 93 P. 2d 897 (1939); *Morrow* v. *State*, 168 Ga. 575, 148 S.E. 500 (1929); *State* v. *O'Donnel*, 176 Iowa 337, 157 N.W. 870 (1916); *Spurlock* v. *Commonwealth*, 311 Ky. 238, 223 S.W. 2d 910 (1949); *State* v. *Butner*, 67 Nev. 436, 220 P. 2d 631 (1950); *State* v. *Ames*, 80 N.E. 2d 168 (Ct. App. Ohio 1947); *State* v. *Casey*, 108 Ore. 386, 213 P 771 (1923); *Commonwealth* v. *Neill*, 362 Pa. 507, 67 A. 2d 276 (1949); *Walker* v. *State*, 144 Tex. Cr. R. 329, 161 S.W. 2d 1077 (1942); *State* v. *Lantzer*, 55 Wyo. 230, 99 P. 2d 73 (1940). The Iowa Supreme Court has even said that it would be an unconstitutional delegation of power to review the jury's determination. *State* v. *O'Donnell*, 176 Iowa 337, 345, 157 N.W. 870, 873 (1916).

There are no statutory or judicial guides by which the jury can decide whether or not to impose the death penalty; it has unfettered discretion. The only instruction

that must be given to the jury is one that informs them that they do have this discretion and reviewing courts will defer to the discretion of the jury when considering the propriety of the death penalty. This means that there is nothing to prevent a death-qualified jury from rendering what may be an unreasonable or even savage result. Because there are no legislative or judicial guidelines or standards given to the jury or the judge, and because the jury that is qualified on the death penalty is not a true cross-section of the community and is prosecution prone (as explained more fully in Point V herein), allowing the state a challenge for cause to prospective jurors with scruples against the death penalty violates the accused's right to a fair and impartial jury under the Sixth Amendment and his right to due process of law under the Fourteenth Amendment.

IV.

THE CHALLENGE FOR CAUSE OF JURORS HAVING SCRUPLES AGAINST THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IF AN APPEAL FOR CLEMENCY ARISES, THERE ARE NO LEGISLATIVE OR JUDICIAL STANDARDS RELATING TO THE GOVERNOR'S POWER OF COMMUTATION, THUS MAKING IT IMPERATIVE THAT THE JURY'S VERDICT UPON WHICH HE MUST ACT BE FREE FROM ANY POSSIBILITY OF BIAS OR PREJUDICE, AND THAT THE JURY BE A TRUE CROSS-SECTION OF THE COMMUNITY.

Article 5, sec. 13 of the Constitution of Illinois provides:

> "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefore."

Several Illinois cases have dealt with interpreting the Governor's power of commutation. In *People* v. *Jenkins*, 325 Ill. 372, 156 N.E. 290 (1927), the Lake County state's attorney sought to overturn a commutation of a life sentence (which was the result of an earlier commutation of a death sentence), alleging that the commutation was unauthorized and unlawful. In holding against the state's attorney, the Illinois Supreme Court noted the Governor's constitutional power over judgments of conviction for all criminal offenses, and held that "[h]aving this power by the Constitution, his use of it cannot be controlled by either the courts or the Legislature. His acts in the exercise of the power can be controlled only by his conscience and his sense of public duty." 325 Ill. at 374, 156 N.E. at 291. Moreover, "[t]he only restriction which the Legislature may impose on the Governor's power refers to the regulations relative to the manner of applying for reprieves, commutations, and pardons, and the act on that subject does not purport to and does not, restrict the Governor's authority except to that extent." 325 Ill. at 375, 156 N.E. at 291.

In *People ex rel Brundage* v. *LaBuy*, 285 Ill. 141, 120 N.E. 537 (1918), the Illinois Supreme Court held that Art. 5, sec. 13 vested in the Governor the exclusive power to grant pardons, reprieves and commutations, and struck down a statute which purported to grant to the sentencing judge the power to vacate his order of commitment.

The exclusive discretion of the Governor in matters of commutation, without judicial review or legislative control,

is practically a universal rule. With only one exception,* those courts which have been presented with the issue have held that the actions of the clemency authority are not within the purview of due process, and are not subject to challenge in the courts. *Executive Clemency in Capital Cases,* 39 N.Y.U. Law R. 136, 178 (1964). The Supreme Court of Oregon, in *Eacret* v. *Holmes (Governor),* 215 Ore. 121, 333 P. 2d 741, 744 (1958), held:

> "Where the constitution thus confers unlimited power on the Governor to grant reprieves, commutations and pardons, his discretion cannot be controlled by judicial decision. The courts have no authority to inquire into the reasons or motives which actuate the Governor in exercising the power, nor can they decline to give effect to a pardon for an abuse of power."

As authorities for this general proposition, the Oregon court cited: *In re Opinion of Justices,* 120 Mass. 600 (1876); *State* v. *Harrison,* 122 S.C. 523, 115 S.E. 746 (1923); *Martin* v. *State,* 21 Tex. App. 1, 17 S.W. 430 (1886); *People ex rel. Page* v. *Brophy,* 248 App. Div. 309, 289 N.Y.S. 362 (1936); *Ex parte Grossman,* 267 U.S. 87 (1924); *Jamison* v. *Flanner,* 116 Kan. 624, 228 P. 82 (1924); *Montgomery* v. *Cleveland,* 134 Miss. 132, 98 S. 111 (1923); 16 C.J.S. Const. Law sec. 157, p. 830.

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* In *McGee* v. *Arizona State Board of Pardons and Paroles,* 92 Ariz. 317, 376 P. 2d 779 (1962), the Arizona Supreme Court held that a condemned defendant had a right to, and compelled the board to grant a full due process hearing despite the absence of any constitutional, statutory, or regulatory provision for a hearing. Under the court's construction, the defendant would have to be provided with notice, an opportunity to be heard, and opportunity to present witnesses, and an opportunity to present evidence mitigating circumstances. The court held due process required this result, but nowhere specified whether the federal constitution or the state constitution was the source of this right.

Thus, the Governor has the exclusive power to exercise executive clemency, unfettered by either judicial review or legislative restrictions. Although in Illinois the Parole Board acts as the Governor's agent in hearing applications for executive clemency, ". . . the Board has no power to grant a pardon, reprieve or commutation, but merely to submit a recommendation to the Governor, who is free to accept or reject the recommendation." *People ex rel. Abner* v. *Kinney*, 30 Ill. 2d 201, 205, 195 N.E. 2d 651 (1964).

Although the author of *Executive Clemency in Capital Cases*, 39 N.Y.U. Law Rev. 136, 159-177 (1964), found that clemency authorities sometimes referred to such "standards" as the nature of the crime, fairness of the trial, mitigating circumstances, doubt as to guilt, mental and physical condition of defendant, recommendations of prosecutor and trial judge, and political pressure and publicity, it is plain that these "standards" vague as they are, still cannot be reviewed by a court or imposed by the legislature.

The totally unfettered discretion given to the Governor, although tending to eliminate some of the harshness of capital punishment, has thus resulted in the creation of a system with no standards. In Lavinsky, *Executive Clemency*, 42 Chi-Kent Law Rev. 13, 39 (1965), the author sums up his impression of the decisional system of executive clemency:

> "Interviews reveal a certain dissatisfaction with the decisional soundness of executive clemency. It would seem that much of the clemency process revolves about somewhat unpredictable patterns of interdependent variables. Human factors seem to become mixed with political factors. There is much publicity, public pressure and emotionalism—all of which tend to divert the governor's attention from the merits of the particular

> case. Indeed, clemency decisions in capital cases have been characterized as often 'fortuitous and discriminatory.' [Address by Norval Morris, Chicago Maroon Forum on Capital Punishment (Feb. 18, 1965)]"

Likewise, after a thorough analysis of a substantial amount of data on executive clemency, the author of *Executive Clemency in Capital Cases*, 39 N.Y.U. Law Rev. 136, 177 (1964) concludes that clemency is "a matter of grace." This results in a number of consequences: (1) the clemency authority exercises complete discretion which cannot be challenged in the courts; (2) judicial evidentiary, substantive, and procedural rules do not apply; (3) there is no constitutional right to a clemency hearing or review; and (4) the due process clauses of the 5th and 14th amendments do not apply in full to the clemency system.

The Governor's power to grant executive clemency is exclusive and absolute. There are no standards which either the courts or the legislature can impose on this power. The convicted, sentenced prisoner does not receive the procedural or substantive safeguards guaranteed to him in a court, and there is no way for him to obtain review of the Governor's decision. This means that arbitrariness or unreasonableness upon the part of the Governor may serve to prevent the undoing of an improper result brought about by a death-qualified jury, further reason for constitutional impediment to the challenge under the 6th and 14th Amendments.

Amicus does not argue that the Governor should be limited in exercising his power of commutation. Since he is the last resort open to one sentenced to death, he should have the widest possible discretion in making such a decision. However, since he is a fallible human being like the rest of us, it is even more important that the jury's

finding upon which he must act be completely free from any hint of bias or prejudice.

V.

ALLOWING DISQUALIFICATION OR CHALLENGE FOR CAUSE OF PROSPECTIVE JURORS WHO HAVE SCRUPLES AGAINST THE DEATH PENALTY WHEN AN INCREASING MAJORITY OF THE POPULATION IS OPPOSED THERETO IS A VIOLATION OF DUE PROCESS AND DEPRIVES THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY ON THE ISSUE OF GUILT.

In order to appraise properly the challenge of jurors for cause on the basis of scruples against the death penalty, it must be viewed in its proper perspective—a carry-over from an outmoded state of the law which has long since been abandoned by nearly every state in the union. The practice originated when conviction for murder meant a compulsory death sentence. Annotation, 48 A.L.R. 2d 560 (1956). Within the last century, a much more enlightened view has prevailed. "The reversal of civilized opinion on the death penalty during the past century and a half has been truly remarkable. It is an example of law in the process of radical change." Kalven & Zeisel, The American Jury (1966), p. 434.

The change has been brought about by a growing attitude on the part of the American public that the death penalty serves no useful purpose and is to be imposed, if at all, only in the most unusual circumstances. The change from compulsory to discretionary imposition of the death penalty has not been accompanied by a similar enlightened attitude in the manner in which the jurors who are to make this discretionary judgment are chosen.

> "With the humanitarian trend away from capital punishment as a mandatory penalty for certain of-

fenses, there was a broad-scale amending of statutes establishing capital crimes. The pertinent compromise adopted was one of watering down the automatic death sanction to the discretionary variety now in vogue. The discretion was placed in the jury. But the related challenge-for-cause statutory provisions were left in pristine form. The result in most capital jurisdictions is that, while the statute defining the particular crime empowers the jury to mitigate the penalty, the statute disqualifying jurors with scruples against the death penalty still speaks in terms of reservations against *conviction* rather than as to *punishment*. Despite this, the almost universal tendency has been to continue to equate these two issues, to deal with them as one. A juror found to be disqualified on the punishment issue is routinely treated as disqualified on the guilt issue as well. The traditions of the one-issue past, when the possibility of a guilty man going *free* was the vital concern, have thus been carried over to the two-issue present, where this concern no longer exists, with little analytical regard for the intervening refinement of the issues in response to the popular will." Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?" 39 Texas L. Rev. 545, 550-1 (1961) (emphasis in original).

In the majority of jurisdictions, the courts have been too liberal and unrealistic in dismissing jurors who give even a hint of having scruples against the death penalty:

"It is not usually required, for example, that he have a settled conviction against levying the death penalty in *any* case. It is enough that he manifest hesitance as to its application. Such hesitance has been many times held sufficiently prejudicial from the prosecution's standpoint to warrant dismissal of the juror for cause. Where, for example, the juror indicates that he is opposed to capital punishment 'in most instances,' or that he is 'inclined that way,' or that he

might be biased against or hindered in imposing it, or that he is opposed but would 'hang some men,' or where he states that he does not know whether he has such scruples, or that he would be opposed unless there were 'no doubt' in his mind, or unless the evidence were 'very strong' or were other than circumstantial, or unless the criminal responsibility were other than vicarious, the juror has been held properly excused for cause. The same conclusion has been reached where the juror expresses opposition to or scruples against capital punishment but states that he could nonetheless, carry out the law in accordance with the evidence and the instructions of the court." *Id.* at 547-8. (emphasis in original, footnotes omitted).

Two states have stood out valiantly, and we believe properly, against this tide of judicial myopia. In *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894), the Iowa Supreme Court held it error to allow a challenge for cause to a prospective juror who was opposed to capital punishment. The court said:

> "It cannot be said that the state is entitled to have the punishment by death inflicted in any case. The statute authorizes that punishment, in the discretion of the jury, . . . but the state has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorially those who have such objections."

A similar holding is found in *State* v. *Garrington*, 11 S.D. 178, 184, 76 N.W. 326 (1898), where the South Dakota Supreme Court held:

> "When section 7359 was adopted as section 332 of the Code of Criminal Procedure of 1877, section 6449 contained only these words: 'Every person convicted of murder shall suffer death for the same' . . . then a verdict of guilty necessarily involved the death of the

accused and conscientious scruples against capital punishment precluded a juror from finding a defendant guilty, but as the law now stands, the entertaining of such opinions does not have that effect, and is not cause for challenge."

It is submitted that the attitude of these two courts is the only one consonant with the requirement of the Sixth and Fourteenth Amendments that the accused be given a trial by an impartial jury. In Illinois, as well as in all other states in which the death penalty is not mandatory, the jury has complete discretion in reaching its decision. As is noted elsewhere in this brief, there is not one single guideline for the jury to follow in deliberating upon whether to recommend the supreme penalty of death. This means that the jury is completely unfettered in reaching its decision. The reasons for the decision are unchecked and may not be inquired into. Having been left with nothing to guide them, it is particularly crucial that the jury be impartial.

This is the point at which the courts and commentators find their greatest difficulty. What constitutes partiality? Some courts have assumed, in allowing challenges for cause against those having scruples against the death penalty, that those having such scruples will automatically favor the accused. Thus, in *People* v. *Hobbs*, 35 Ill. 2d 263 (1966), the Illinois Supreme Court rejected defendant's argument for a jury including people having scruples against the death penalty as asserting a "right to have some individuals on the jury who may be prejudiced in his favor, someone who is unalterably opposed to one of the possible penalties with which he is faced." *Id.* at 272.

But what relationship should there be between the issues of guilt and punishment? Clearly, the two issues are to

be separated. In almost every other instance they are separated. The basic and most important issue, which must be confronted first is the issue of guilt. No consideration of the possible punishment to be imposed, once guilt has been determined, should intrude upon the jury's deliberations upon this issue. This was the very reason for allowing the jury discretion in imposing the death penalty. Too many juries were acquitting obviously guilty defendants charged with crimes carrying a mandatory death sentence, not because they felt that the defendant was innocent, but because they felt that the death penalty should not attach. Therefore, discretion was given to disassociate the issue of guilt from the punishment to be imposed.

The assumption that jurors who have scruples against the death penalty will be biased in favor of the defendant on the issue of guilt is no more logical than the proposition that jurors who have no scruples against the death penalty will be biased in favor of the prosecution on the issue of guilt. As a matter of fact, it has been shown that jurors who are in favor of the death penalty are in fact prosecution prone. Professor Hans Zeisel has written, in "Some Insights into the Operation of Criminal Juries" (1957) (unpublished):

> "In the course of our investigation of Special Jurors [in New York], we found the following relationship between attitude towards the death penalty and prosecution proneness:
>
> | "Scruples Concerning Capital Punishment | Prosecution Proneness |
> |---|---|
> | None | 54 |
> | Some | 52 |
> | Major | 42 |
>
> "These figures indicate that jurors who have no scruples against the death penalty are about 28

percent more prosecution prone than those who have major scruples against it (.54 over .42 = 1.23).

"This constitutes a major, if subtle, argument against capital punishment along these lines: The present practice is to admit only such jurors to a capital case who have no scruples concerning the death penalty. But by setting this limitation, the defendant's chances of being acquitted are adversely affected. The probability of his being found guilty by jurors who have no scruples against the death penalty is 28 percent greater than if he were judged by jurors who do have such scruples.

"The point, of course, is that this difference is not due to the fact that the one type of juror does not mind if a guilty murderer is executed, while the other does, but rather that the jurors who are for the death penalty happen also to be more prosecution prone than the jurors who are against it.

"It must be remembered that our measure of prosecution proneness is derived from votes on *all* kinds of cases of which only one percent were actually capital cases.

"The ideal, if only hypothetical solution, of this difficulty would be to leave the jury ignorant of the possibility that a guilty verdict might result in the defendant's execution. In that case, it would not be necessary to select only jurors who have no scruples aaginst the death penalty.

"Barring this unrealistic possibility, one might wonder whether it would indeed be inadvisable to admit also such jurors to capital cases who had scruples against the death penalty.

"One could hardly see this done where a guilty finding on the major charge makes the death

> penalty mandatory. In such a case, a juror with scruples against the death penalty might be tempted to acquit merely because of his scruples."

As further support for this proposition, attached hereto, as Appendix A, are pertinent excerpts from an unpublished paper entitled, "Belief in Capital Punishment and Jury Performance," by W. Cody Wilson of the University of Texas.

Professors Kalven and Zeisel are now in the process of completing a more comprehensive study to determine whether jurors qualified for the death penalty are prosecution prone. This study may be completed by the time oral argument is heard in this case. There is no reason to believe that this study will not support and reinforce the present data showing that death qualified jurors are in fact prosecution prone.

> "Persons opposed to capital punishment form a sizeable and definite class in our society, and those in favor of capital punishment are actually in the minority. Of the people in favor of capital punishment, many do not like the idea of having anything to do with it themselves. (Wiehofen, The Urge to Punish, 168 (1956)) Can it be said then that a jury composed of such a class of persons, who are in a minority in our society and who may tend to more quickly find a criminal defendant guilty on less evidence, does not deprive that defendant of due process of law?" Note, Challenge for Cause, 45 North Carolina L. Rev. at 1073-4(1967).

The consequence is that a jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members:

> "And when it is further considered that the issue of guilt or innocence in the less important cases—the

non-capital cases—is determined by a jury not similarly shorn of its most humanely-disposed constituents, the result becomes even more ironic: *the graver the charge the less the protection accorded the accused.*" (Oberer, *supra*, at 549) (emphasis in original).

The result of the Illinois statute is to exclude purposefully from the jury those jurors who will balance and check the tendencies of those who are prosecution prone. This brings us back to the issue of what constitutes an impartial jury. It becomes increasingly clear that it is impossible to find the elusive "impartial juror," much less twelve of them, in a capital case where so much rides upon their decision. The answer then becomes clear: the only way in which a person accused of a capital crime may obtain a fair trial is to have an impartial *jury* chosen without inquiry as to whether they do or do not have scruples against the death penalty. This is the only way the defendant will be assured of due process of law.

It is indeed ironic that the State of Illinois has taken that one institution which we have always regarded as a prime safeguard of the rights of an accused, the jury, and twisted it into a device which is stacked against the defendant from the outset. Illinois has granted jurors discretion on the imposition of the death penalty, but by precluding from jury service those who have scruples against this penalty, it has granted the jurors only discretion to impose the death penalty, not to refuse to do so.

This is a calculated scheme to deprive the defendant of his right to a trial by a fair cross-section of his community. Of course this does not mean that he has an affirmative right to have someone opposed to the death penalty on his jury, but it does mean that he has the right not to have these people excluded, particularly where they form almost half of the population, and more in some areas.

This court has consistently recognized that the purposeful exclusion of portions of the community without a rational excuse therefor is anathema to our system. In *Thiel* v. *Southern Pacific,* 328 U.S. 217, 220 (1946) this Court said:

> "The American tradition of trial by jury, considered in connection with either civil or criminal proceedings necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

Again, in *Ballard* v. *U.S.,* 329 U.S. 187, 195 (1946) this Court said:

> "But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts."

Once again, in *Glasser* v. *U.S.,* 315 U.S. 60 (1942), at p. 86, this Court stated:

> ". . . the proper functioning of the jury system and, indeed our democracy itself, requires that the jury be a body truly representative of the community and not the organ of any special group or class. . . . Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to impairment of substantial liberties."

The foregoing facts have shown conclusively that by excluding from the jury those who have scruples against the death penalty, a substantial portion, a growing majority, of the community is excluded from sitting on a jury where this sentence is a possibility. This violates the Constitution in the most flagrant manner.

Fay v. *New York,* 332 U.S. 261 (1947) is not to the contrary, as it was based upon a failure to prove that the special jury there dealt with was prejudicial to the defendant. Since that time, the evidence that prejudice must necessarily result in a case such as this has become conclusive.

The effect of this practice is well expressed by Oberer, when he states:

> "A prime value, as I see it, of jury trial in criminal cases is to bring the conscience of the community to bear upon the issues presented. In this fashion, contact between the people and the law is maintained. This contact is of compelling importance in maintaining the respect for the administration of justice so vital to a free society. What is the effect, viewed in

this context, of the disqualification for cause by reason of scruples, broadly defined, against the death penalty? Does this not operate *against* bringing the community conscience to bear on the primary guilt issue, as well as the punishment issue in the most crucial of cases? Might not a minority point of view be imposed through the death-qualified jury?" (Oberer, *supra,* at 555) (emphasis in original).

Oberer's comments have been borne out by experience and the various studies which have been conducted on this subject. It is a minority viewpoint, hostile to the accused, which is represented by a jury which has been qualified on the death penalty. Oberer continues:

"... the gulf between the community and the death qualified jury grows as the populace becomes the more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death verdict becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, *to be sworn as a juror in a capital case*—wanes in a particular community, the prejudicial effect of the death-qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication to human charity and understanding. The due-process implications of this flux seem obvious. Yesterday's practice becomes less and less relevant to today's problem." (Oberer, supra at 556-7) (emphasis in original)

There is one aspect of *Fay,* however, which must be re-examined by this court. In *Fay,* it was held that the defendant must prove prejudice to him as a result of the exclusion of jurors. This no longer comports with the approach taken by the Court to issues as basic as this. The

new and more correct attitude is shown in *Estes* v. *Texas*, 381 U.S. 532, 85 S.Ct. 1628 (1965), where Justice Clark stated on behalf of the court:

> "... this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. . . . It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:
>
> > 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness.* * * [T]o perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 [99 L.Ed. 11].' At 136, 75 S.Ct. at 625. (Emphasis supplied by the Court.)

And, as Chief Justice Taft said in *Tumey* v. *State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, almost 30 years before:

> 'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and accused denies the latter due process

of law.' At 532, 47 S.Ct. at 444. (Emphasis supplied by the Court.)

"This rule was followed in *Rideau* [v. *State of Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963)], and in *Turner* v. *State of Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965). In each of these cases the Court departed from the approach it charged in *Stroble* v. *State of California,* 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), and in *Irvin* v. *Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In Rideau and Turner the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and *White* v. *State of Maryland,* 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), we applied the same rule although in different contexts." Id. at 542-4.

In the same line, see *Sheppard* v. *Maxwell,* 384 U.S. 333, 86 S.Ct. 1507 (1966).

This is one of the cases which fits into the category where the practice of the State is so fraught with danger to the defendant that no actual prejudice need be shown before this court will hold that he has been denied due process. The disqualification of the most humane half of the prospective jurors in the community, leaving the defendant to the not too tender mercies of a minority biased against him, can only place the defendant at an insuperable disadvantage. The fact that this is done only in those cases where the supreme penalty may be imposed makes it doubly obnoxious. For these reasons, anything in *Fay* which is contrary hereto should be overruled.

The only safeguard, then, against arbitrariness is to declare that, as a matter of constitutional necessity, no

challenge for cause may be exercised against a juror having scruples against the death penalty.

CONCLUSION

Long after everyone ceased to believe in witches, the laws which had brought death to many of our ancestors remained on the statute books in colonial America, as if to remind us, as Lincoln knew, that we must disenthral ourselves. In the same way, the challenge "for cause" of jurors who have scruples against the death penalty remains in effect although, at this stage of our history, it is an unconstitutional impediment to a fair and impartial jury in murder cases and a denial of due process. Fewer and fewer people believe in the death penalty—the majority are against it; less and less is it imposed either by courts or juries; even less is it carried out. In essence, the death penalty itself and particularly the challenge of jurors with scruples against it create an unconscionable lottery in which a few unlucky persons, no worse than others except for the fortuitous circumstances of race, education and financial standing, receive the extreme penalty. Because such challenge affronts the conscience of America and for the other reasons set forth hereinabove, this court should declare the challenge of jurors with such scruples to be unconstitutional and the petitioner William Witherspoon, a victim of the exercise of the challenge, should be granted a new trial.

Respectfully submitted,

ELMER GERTZ
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American Civil Liberties
Union, Amicus Curiae.

JOEL J. SPRAYREGEN,
Of Counsel.

APPENDIX "A"

Summary of "Immutable Judgment: Murder and Capital Punishment In Illinois—A Survey," by the Illinois Division, American Civil Liberties Union (March, 1965, unpublished)

The committee found, first of all, that the death penalty is too often not a punishment for murder, but for refusing to plead guilty to murder. Such, indeed, is the situation in the instant case of William Witherspoon, who, contending that the slaying of the police officer was accidental, refused to accept a long-term sentence. There is only one case in our generation in Illinois where a death sentence was imposed after a plea of guilty to murder. *People* v. *Wilson,* 29 Ill. 2d 82, 193 NE 2d 449 (1963).

The report set forth some of the situations in which there is bargaining between the State and the defense, dependent upon circumstances other than the merits of the case. The report reached the conclusion that almost every defendant indicted for murder has it within his power to save himself from the chair by making a deal with the prosecution and that sometimes such deals are made even when the circumstances are such that the defendant could not reasonably have been convicted of murder.

Next, the committee found that adventitious or fortuitous circumstances sometimes send men to their death. In the case of Vincent Ciucci (*Ciucci* v. *Illinois,* 356 U.S. 571 (1958)), the State tried Ciucci three times successively on charges of murder until it obtained the death sentence, although all of the offenses were committed at the same time as part of one chain of events. The committee

found that much may depend upon whether the crucial evidence has been preserved and is still available to counsel for the defense. This in turn may depend upon how soon after the crime counsel was obtained, or it may depend upon sheer chance. Given the most skilled and diligent attorney, the most learned and fairest of judges, the most able of juries, the outcome of a criminal trial may, nonetheless, be determined by chance. True, much else is a matter of chance, but the very life of an individual should not depend upon chance in a system of constitutional justice.

The Committee found that the defense is seriously handicapped by lack of pre-trial discovery in criminal trials, citing the case of Lloyd Eldon Miller, (*Miller* v. *Pate,* 386 U.S. 1, 87 S.Ct. 785 (1967) with which this Court is familiar, as a classic example.

The committee found that in this battle for life the State has a full range of technical and scientific resources. The defendant is granted no such assistance. Frequently, he must depend upon voluntary counsel working free and either paying all or part of the expenses, again as in the Lloyd Eldon Miller case, the case of Paul Crump (*People* v. *Crump,* 5 Ill. 2d 251; 12 Ill. 2d 402) and others.

The committee found that the extensive appellate procedures are largely confined to questions of law. On disputed fact questions, the findings of a single judge or jury in general are decisive from beginning to end. This is illustrated by the *Townsend* case (*Townsend* v. *Sain,* 372 U.S. 293 (1963)) and others which have come before this Court.

The committee found that, in the ultimate sense, the jury was called upon to make a determination as to the state of mind of the defendant when the act was committed, a field in which there is too little knowledge and virtually no certainty. A classic example of this is *Alcorta* v. *Texas,* 355 U.S. 28 (1957).

Of course, too, the committee found that in a disproportionate number of cases those sentenced to death are Negroes or from other minority groups, and are largely uneducated, at the bottom of the ladder economically and socially, seldom with strong family ties and seldom able to employ counsel. Persons no worthier than those condemned receive more generous treatment at the hands of society because they are better situated. "To him that hath shall be given; from him that hath not shall be taken."

APPENDIX "B"

BELIEF IN CAPITAL PUNISHMENT AND JURY PERFORMANCE

By Cody Wilson
University of Texas

The Problem . . .

. . . Do people who believe in capital punishment differ from those who have scruples against capital punishment in other psychological characteristics relevant to the jury trial process?

A study of 187 junior and senior college students was carried out in the spring of 1964 in order to provide an answer to the general question.

The Study

The general question was differentiated into several more specific questions; do people who believe in capital punishment differ from those with scruples against capital punishment in terms of: a) tendency to say guilty in response to simulated capital cases; b) confidence in decisions of guilt and innocence; c) degree of punishment (excluding death penalty) recommended; d) bias in favor of the prosecution and against the defendant; and e) bias against insanity as a defense plea.

Information was obtained from the students by means of a questionnaire that contained several different parts.

One part of the questionnaire was composed of a series of simulated capital cases; that is, brief written descriptions of the facts presented to the jury in five criminal

court cases. The individual was asked to assume that he is a member of the jury before which the case is being tried and, on the basis of facts and his interpretation and evaluation of them, to reach a decision of guilt or innocence. He was also asked to indicate the degree of confidence that he had in each decision. The cases involved rape and murder, burglary and murder, robbery and murder, rape, and domestic homicide. The number of cases in which the verdict of guilty was reached was used as an index of the tendency to say guilty.

The subjects were also asked the question the answer to which forms the basis of a challenge for cause, "Do you have conscientious scruples against the death penalty, or capital punishment for a crime?" The answers were either yes or no.

The subjects were asked to agree or disagree with a series of statements such as;

a) The district attorney's interpretation of the facts in a criminal case are usually more reliable than the defense lawyers.

b) If two witnesses gave conflicting testimony in a criminal case, I would probably believe the witness for the prosecution rather than the witness for the defense.

c) If I were a member of a jury, I could never vote "not guilty" for a man whose defense was insanity.

d) The plea of "not guilty by reason of insanity" is a loophole that allows many criminals to escape punishment.

The number of statements, similar to the first two, that the subject agreed with was used as a measure of the

tendency to be biased in favor of the prosecution. The number of statements, similar to the latter two, that the subject agreed with was used as a measure of the tendency to be biased against insanity as a defense plea. There were eight statements of the first type and seven of the second type.

Lastly, the subjects were asked to assume that the jury had agreed upon a verdict of guilty in each of the simulated cases. Now he was asked to recommend an appropriate punishment. The allowable punishments ranged from suspended sentence to life imprisonment but did not include the death penalty. Each subject was given a score based on the amount of punishment recommended.

The subjects were divided into two groups based on their answer to the question, "Do you have conscientious scruples against capital punishment?", and the two groups were compared in terms of their responses to the other question.

The Results

People who have scruples against capital punishment are less likely to say guilty than are people who believe in capital punishment.

• • •

People who believe in capital punishment are more confident of their decisions of guilt and innocence than are people who have scruples against capital punishment.

• • •

That is, people who believe in capital punishment are not only more likely to say guilty, they are also more sure that they are right in their decision.

People who believe in capital punishment are likely to assess a more severe punishment—even without the death penalty—than are people who have scruples against capital punishment.

• • •

People who believe in capital punishment are more likely to be biased in favor of the prosecution than are people who have scruples against capital punishment.

• • •

People who believe in capital punishment are more likely to be biased against insanity as a defense than are people who have scruples against capital punishment.

• • •

Similar results were found for a similar group of 61 students in New York City.

Conclusions

If we may assume that the observed relationships between these variables hold among the adult population at large (and it is generally found that relationships among such value and behavior items are stronger among adults in general than among college students), then we may conclude that a jury selected by systematically excluding people who have scruples against capital punishment is biased in the direction of being more likely to bring a verdict of guilty, being more confident of this decision of guilt, favoring the prosecution in opposition to the defense, being prejudiced against the plea of not guilty by reason of insanity, and assessing a more severe punishment excluding the death penalty.

If the existence of such systematic biases in juries as a result of the selection process constitutes denial of fair trial, then disqualification of jurors for scruples against capital punishment does constitute denial of fair trial.

SUPREME COURT, U. S.

MAR 8 1968

JOHN F. DAVIS, CLERK

NO. 1015

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM C. WITHERSPOON,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,
Respondents.

MOTION OF OSCAR TURNER FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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MOTION OF OSCAR TURNER FOR LEAVE TO FILE AMICUS CURIAE BRIEF[1]

TO THE HONORABLE JUSTICES OF SAID COURT:

The Applicant, Oscar Turner, moves the Court for leave to appear as Amicus Curiae in this cause, and to file a Brief in Support of the Petitioner Witherspoon, and Applicant Oscar Turner would show the Court:

1. Applicant Oscar Turner is vitally interested in the case of Witherspoon vs. Illinois because a judgment favorable to the

[1] While the Petitioner has consented to the filing of this Brief, the Attorney General of Illinois has not.

Petitioner Witherspoon will necessarily result in a reversal of the death penalty judgment which has heretofore been adjudged against the Applicant in the 54th District Court of McLennan County, Texas. Your Applicant was there convicted and adjudged the death penalty on January 24, 1968, as the result of a verdict by a jury selected, over the Applicant's objections, by a selection procedure which eliminated as eligible jurors all veniremen expressing conscientious scruples against the imposition of the death penalty, in response to questions by State's counsel.

2. (a) Applicant would urge upon the Court facts and questions of law which would not be adequately presented by Petitioner, who is not a Negro.

(b) These are: The Applicant Oscar Turner is a Negro, and he was convicted of the murder of two white men and assessed the death penalty by an all white jury, designedly selected by the State to eliminate from the trfal jury all Negroes. The death penalty disqualification under the facts and circumstances of the jury's selection was a significant and decisive instrument in this design. This design, and the trial and judgment resulting from this design, violates the Defendant's rights under the Constitution of the United States, Article V, Article VI and Article XIV, in that he was denied due process of law, and denied the trial by a fair and impartial jury, was denied the equal

protection of the laws, and suffered discrimination by reason of his color.

3. Clearly Applicant's position is relevant to the disposition of the main cause. If, as the Applicant contends, disqualification of veniremen because of conscientious scruples against the death penalty is an instrument which tends to produce all white jurors in capital trials of Negro defendants, then there are compelling constitutional reasons for removing this discriminatory instrument from the employment of the prosecution in the selection of trial juries.

4. This Motion is supported by the attached Affidavit of Joel W. Westbrook.

JOEL W. WESTBROOK
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Waco, Texas

CHARLES E. WALLACE
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Counsel for Applicant
Oscar Turner

THE STATE OF TEXAS)
)
COUNTY OF McLENNAN)

AFFIDAVIT

Joel W. Westbrook, being sworn, states:

1. He is, together with Charles E. Wallace, Esq., court appointed counsel for the Applicant Oscar Turner for both the trial of the case in the 54th District Court of McLennan County, Texas, and for the appeal from the judgment of that Court.

2. The record of the trial, the selection of the trial jury, the pre-trial sanity hearing and jury selection, and the pre-trial hearing, as well as the instruments on file, has not been prepared, although it is in the process of being prepared.

3. Attached to the Brief which your Applicant asks leave to file is an Appendix, which consists of an Affidavit, sworn to by counsel, respecting relevant proceedings in State vs. Oscar Turner.

JOEL W. WESTBROOK

SUBSCRIBED AND SWORN TO BEFORE ME THIS THE DAY OF , 1968.

Notary Public in and for McLennan County, Texas

SUPREME COURT, U. S.

MAR 11 1968

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PETITIONER'S BRIEF

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Adorno, et al., "The Authoritarian Personality" (Harper, 1950) 30

Annot., "Beliefs Regarding Capital Punishment As Disqualifying Juror In Capital Case For Cause," 48 A.L.R. 2d 560 (1956) 34

Finkelstein, "The Application of Statistical Decision Theory To The Jury Discrimination Cases," 80 Harv. L. Rev. 338 (1966) 32

Goldberg, "Attitude Toward Capital Punishment and Behavior As A Juror In Simulated Capital Cases" 31-32, 35

Jewel, "The Death Penalty — A Suggestion for California", 36 J.S.B. Calif. 240 (1961) 27

McClelland, "Conscientious Scruples Against the Death Penalty in Pennsylvania," 30 Penn. Bar Ass'n. Quar. 252 (1959) 15

Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?", 39 Texas L. Rev. 545 (May, 1961) 29-30

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IN THE

Supreme Court of the United States

No. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

PETITIONER'S BRIEF

Opinion Below

The opinion of the Supreme Court of Illinois is reported at 36 Ill. 2d 471, 224 N.E. 2d 259 (1967).

Jurisdiction

The opinion and judgment of the Supreme Court of Illinois was entered on January 19, 1967. A petition for rehearing was denied on March 27, 1967, and the judgment became final on that date. Writ of certiorari was granted on January 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State . . . wherein the crime shall have been committed. . . . "

The Fourteenth Amendment to the United States Constitution provides in part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 360 of the Illinois Criminal Code (Ch. 38, § 360, Ill. Rev. Stat. 1959) provided:

> "Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court."

Section 743 of the Illinois Criminal Code (Ch. 38, § 743, Ill. Rev. Stat. 1959), the statute here in question, provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

Section 801 of the Illinois Criminal Code (Ch. 38, § 801, Ill. Rev. Stat. 1959) provided in pertinent part:

> "In all cases where any person . . . shall be charged with . . . murder . . . and the case shall be tried by a jury and the jury shall find the defendant guilty, the jury shall also by its verdict fix the punishment. . . . In all cases tried by the court without a jury, on a plea

of not guilty or on a plea of guilty, for the purpose of determining the duration of imprisonment the court may, after conviction of the person, consider the evidence, if any, received upon the trial, and any other evidence offered as to aggravation and mitigation of the offense, and may also hear and receive evidence as to the moral character, life, family, occupation, and criminal record, if any, of such person so convicted. . . ."

Question Presented

Whether the operation of the Illinois statute providing that the state could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment deprived the petitioner of a jury which fairly represented a cross section of the community, and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF FACTS

In October 1959, petitioner was indicted for the murder of a Chicago policeman. (A. 1-3.)* Since petitioner was indigent, counsel was appointed to represent him.

Under an Illinois statute in effect at the time of petitioner's trial (Ch. 38, § 801, Ill. Rev. Stat. 1959), if a defendant indicted for murder exercised his right to be tried by a jury (Illinois Constitution, Art. II, § 5), the jury fixed the punishment in the event the defendant was found guilty. The punishment thus fixed could not be altered by the trial judge.**

Petitioner's Motion To Limit the Jury To Determining Issue of Innocence Or Guilt.

Prior to trial, petitioner's counsel filed a motion for the entry of an order directing that the jury decide only the issue of whether petitioner was innocent or guilty of the crime charged in the indictment, and that no issue or form

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* "A." refers to the printed abstract filed in the Supreme Court of Illinois on petitioner's original appeal (No. 36277). "R." refers to the transcript of petitioner's trial, not printed. "Abst." refers to the printed abstract filed in the Supreme Court of Illinois on this appeal (No. 39387). "App." refers to the various appendices to this brief.

** In 1961, this statute was replaced by another (still in effect) which authorizes the jury in murder cases to return a verdict of death in the event the defendant is found guilty, but this verdict is not binding on the trial judge. The jury no longer returns verdicts as to the number of years of imprisonment to be served by defendants who are found guilty. (Ch. 38, § 1-7(c)(1), Ill. Rev. Stat. 1967.)

of verdict be presented to the jury regarding the sentence to be imposed upon petitioner in the event he was found guilty. (R. 70-71.) This motion was denied. (R. 74.)

Selection of the Jury

Ninety-six persons were questioned during the course of the selection of the jury. Of these, 47, or approximately 49% of those examined, were excused for cause at the request of the state pursuant to Section 743 of the Illinois Criminal Code (Ch. 38, § 743, Ill. Rev. Stat. 1959) which provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *

Although in a few instances the form of the question varied, the vast majority of veniremen were excused on the basis of an affirmative answer to the question "Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?" Early in the selection process the judge interrupted the State's Attorney, who had been asking preliminary questions before getting to the usual question on opposition to the death penalty; the judge said, "Let's get these

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* This statute was repealed in 1961, and was replaced by a statute which provides simply that "Each party may challenge jurors for cause." (Ch. 38, § 115-4(d), Ill. Rev. Stat. 1967.) The Illinois Supreme Court has held that in murder cases in which the death penalty is sought by the state, this statutory change did not affect the state's right to challenge for cause veniremen who have conscientious scruples against imposition of the death penalty. *People* v. *Hobbs*, 35 Ill.2d 263, 274, 220 N.E.2d 469, 475 (1966), cert. denied 386 U.S. 1024.

conscientious objectors out of the way, without wasting any time on them. Ask him that question first." (App. 1, p. 6.) Thereafter, in most instances the "death penalty question" was asked before or immediately after the prospective juror's name and address were established. All jurors who admitted to any scruples against or opposition to the death penalty were excused for cause.

Most of the "death penalty" challenges for cause were based upon inadequate and superficial inquiry. Of the 47 veniremen excused by reason of their scruples against the death penalty, 26 were removed after they had answered one or two questions put to them by the trial judge concerning the death penalty, without even giving their names and addresses. (Add. 1, pp. 16, 18, 21-30.) Another five prospective jurors, having raised their hands in response to a general question put by the trial judge, were excused *en masse* without having answered a single question. (App. 1, p. 15.)

The following statistics appear from the record with respect to the 96 veniremen examined:

> Two stated that they did not "believe" in capital punishment, and were thereupon excused for cause. (App. 1, pp. 8-9, 29.)
>
> One stated that while he did not have any religious or conscientious scruples against infliction of the death penalty in a proper case, he did not "believe in the death penalty" and "wouldn't want to be responsible for putting— [at this point he was interrupted by the trial judge who said "None of us do."]—deciding somebody should be put to death." The venireman was excused for cause. (App. 1, pp. 35-36.)

Ten were excused for cause after stating that they had religious or conscientious scruples against the infliction of the death penalty. (App. 1, pp. 14-16, 23, 43.)

Twenty-nine were excused for cause after they stated that they had conscientious or religious scruples against infliction of the death penalty "in a proper case." (App. 1, pp. 5, 7, 9, 12-13, 15-16, 18, 21-31, 33, 42.)

Only five veniremen stated that their scruples against infliction of the death penalty would actually prevent them from imposing the death penalty under any circumstances if petitioner were found guilty. (App. 1, pp. 1-2, 8, 10-11, 37-38, 40-41.)

None stated that his views on capital punishment would affect his ability to render a fair verdict on the primary issue of petitioner's innocence or guilt of the crime charged.

Forty-nine stated or indicated by silence that they did not have a religious or a conscientious scruple against the infliction of the death penalty. Of these, 38 said that if the defendant were found guilty of murder and they were convinced that the proper penalty under the law and the evidence was that of "death in the chair," they would return a verdict of guilty and fix the penalty at "death in the chair." (App. 1, pp. 314, 17-18, 20-26, 28-44.)

The pertinent quotations from the *voir dire* examination are set forth in Appendix 1 to this brief.

The Verdict and Judgment

On April 20, 1960, the jury returned its verdict finding petitioner guilty of murder and fixing punishment at death. (A. 220.) On April 25, 1960, judgment was entered on the verdict, whereupon petitioner's court appointed attorneys were given leave to withdraw. (A. 220-222.)

Petitioner's Post-Conviction Proceedings

Through newly appointed counsel, petitioner appealed to the Supreme Court of Illinois. The judgment of conviction and the sentence were affirmed. (27 Ill.2d 483, Mar. 25, 1963, rehearing denied May 22, 1963). The counsel appointed to represent petitioner in the Supreme Court of Illinois withdrew, and new counsel was not appointed on his behalf until after the time for petitioning this Court for writ of certiorari had expired.

Thereafter, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division. In November, 1963 the petition was dismissed without prejudice, on the ground that petitioner had not yet exhausted his state court remedies. Petitioner then filed a petition under the Illinois Post-Conviction Hearing Act (Ch. 38, §§ 826-832, Ill. Rev. Stat. 1961). The petition was dismissed by the trial court, and the Supreme Court of Illinois denied petitioner's petition for writ of error. (Unpublished opinion No. 3559, Jan. 17, 1964.) The Illinois Supreme Court also denied petitioner leave to file an original petition for writ of habeas corpus.

Petitioner thereupon filed a motion to reinstate his previously dismissed federal petition for writ of habeas corpus. In May, 1964, the federal district judge ruled that petitioner had been deprived of his constitutional rights

because the jury which determined his guilt had also passed upon his sentence. The case was remanded to the state court for resentencing. The Court of Appeals for the Seventh Circuit reversed the order, and remanded with directions to dismiss the petition. (337 F.2d 427, 7th Cir., Sept. 28, 1964.) This Court denied petitioner's petition for writ of certiorari. (379 U.S. 950, Dec. 14, 1964.)

In February 1965, newly appointed counsel for petitioner filed a petition in the Circuit Court of Cook County, Criminal Division, which has given rise to the present proceedings. (Abst. 2-14.) In this petition, petitioner argued (*inter alia*) that his constitutional rights were denied him because the trial court excused for cause prospective jurors having scruples against capital punishment, and because the trial judge permitted the jury to fix the penalty as well as to determine issues of guilt or innocence. In March 1965, the trial court denied the state's motion to strike the petition for want of jurisdiction. (Abst. 64.) In April 1965, the trial court, on its own motion, denied petitioner's request to introduce evidence in support of his petition, and dismissed the petition (as amended). (Abst. 60, 62-64, 69.) On direct appeal to the Supreme Court of Illinois, the trial court's dismissal was affirmed (36 Ill. 2d 471, Jan. 19, 1967, rehearing denied Mar. 27, 1967). The court considered and rejected petitioner's contention that his constitutional rights had been violated by reason of the disqualification for cause of jurors having scruples against imposition of the death penalty. (36 Ill. 2d at 475-6.)

On January 15, 1968, this Court granted petitioner's petition for a writ of certiorari limited to the question set forth above.

Petitioner's execution has been stayed by order of the Illinois Supreme Court pending the outcome of this proceeding.

Summary of Argument

Part I

The Illinois statute in effect at the time of petitioner's trial provided that in murder cases where the defendant was tried by jury, the degree of punishment to be assessed in the event of a finding of guilty was to be determined at the same time and by the same jury which decided the defendant's guilt. (Ill. Rev. Stat. 1959, ch. 38, §801.) Illinois law also provided (Ill. Rev. Stat. 1959, ch. 38 §743):

> "In trials for murder it shall be a cause for challenge of any juror, who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

Pursuant to Section 743, 47 jurors, constituting 49% of all jurors examined on *voir dire,* were excused for cause because of their abstract views on capital punishment, without a showing in any case that those views would affect the veniremen's deliberations on the issue of petitioner's innocence or guilt, and without a showing in most cases that those views would have prevented them from considering imposition of the death penalty if petitioner were found guilty. (Part I A, pp. 13 to 16 below.)

This unjustified exclusion of prospective jurors deprived petitioner of rights guaranteed him under the jury trial provisions of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment for the following reasons:

> *First,* reliable public opinion polls show, and the record in this case confirms, that fully half the people in the United States oppose capital punishment. Exclusion of those persons from the venire deprived petitioner of a jury selected from a fair and full cross-

section of the community, particularly since it served to exclude a disproportionately high percentage of citizens from certain distinguishable racial, social and economic groups, such as Negroes, women, Democrats and persons in lower income brackets (Part I B, pp. 17 to 28 below);

Second, valid and undisputed scientific studies show, as practicing lawyers have long known, that a jury composed of persons who have no scruples against capital punishment is partial to the prosecution on the issue of innocence or guilt, and is therefore more likely to find the defendant guilty than a jury from which scrupled jurors are not excluded. The Illinois statute thus operated to assure the prosecution of a jury which was biased in its favor on the crucial threshold issue of petitioner's innocence or guilt (Part I C, pp. 28 to 33 below); and

Third, common sense as well as recent scientific surveys demonstrate that jurors who favor capital punishment are more likely, in deciding the penalty issue, to impose the death penalty or a long term of imprisonment than jurors who oppose capital punishment. Thus, the Illinois statute assured the prosecution of a jury which tended to mete out far more severe penalties than would a jury selected from the community as a whole (Part I D, pp. 33 to 36 below).

Part II

The constitutional defects in the Illinois statute which are specified in Part I cannot be cured by holding that the state must demonstrate that a prospective juror's scruples against capital punishment will prevent him from considering imposition of the death penalty if the defen-

dant is found guilty. Petitioner was entitled to have persons sit on his jury and determine the primary issue of innocence or guilt even though those persons would refuse to consider imposition of the death penalty if petitioner were found guilty. Otherwise, the jury which tries the innocence-guilt issue will suffer from two of the three defects set forth in Part I, namely:

> *First*, the venire will not represent a fair and full cross-section of the community; and
>
> *Second*, the venire will be made up of persons who are partial to the prosecution on the crucial issue of guilt or innocence. (Part II A, pp. 38 to 40 below.)

The state may not deprive petitioner of his right to have scrupled persons sit on his jury by establishing a single-trial, double-issue procedure. So long as the state persists in that procedure, it must forego challenges for cause of scrupled jurors so that all defendants are afforded trial of the innocence-guilt issue before an impartial cross-section jury.

No irreconcilable conflict exists between the rights of the petitioner and the interest of the state. The dilemma created by the double-issue procedure can be obviated either by placing the penalty fixing power in the hands of the judge, as Illinois has done in all non-capital cases, or by adopting a system of bifurcated jury trials. (Part II B, pp. 40 to 43 below.)

ARGUMENT

I.

AS A RESULT OF THE AUTOMATIC EXCLUSION OF VENIREMEN BY REASON OF THEIR ABSTRACT VIEWS ON CAPITAL PUNISHMENT, PETITIONER WAS FORCED TO SELECT HIS JURY FROM A VENIRE WHICH DID NOT REPRESENT A FAIR CROSS SECTION OF THE COMMUNITY, AND WHICH WAS PARTIAL TO THE PROSECUTION.

A.

Pursuant To The Illinois Statute, Veniremen Were Excused For Cause Solely By Reason of Their Abstract Views Concerning the Death Penalty, Without A Showing That They Would Not Consider Or Assent To the Death Penalty.

The plain language of Section 743 authorizes exclusion for cause of veniremen solely by reason of their scruples against or opposition to the death penalty. The statute does not require the state to demonstrate that the veniremen's views would prevent their considering the death penalty in the event the defendant were found guilty, or would otherwise result in bias against the state or in favor of the defendant. The statutory exclusion for cause thus fails to make provision for persons who oppose or who have conscientious scruples against the death penalty, but who nevertheless will follow the trial judge's instructions to consider signing a death verdict if the defendant is found guilty.*

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* One of the scientific surveys referred to below discloses that many persons who state that they oppose or have scruples against the death penalty nevertheless will assent to capital punishment when presented with the facts of particular cases. See Appendix 4, page 67.

Although 47 veniremen were excused for cause, in only 5 instances was inquiry made to determine whether their abstract views concerning capital punishment would prevent consideration of the death penalty under any circumstances. Thus, the judge excused for cause every venireman who stated that he did not "believe in capital punishment" or who answered "yes" when asked, "Do you have any religious or conscientious scruples against infliction of the death penalty?" or "Do you have any religious or conscientious scruples against infliction of the death penalty in a proper case." These questions were woefully inadequate to test whether the prospective juror's theoretical views would prevent him from considering all forms of penalty verdicts in the event petitioner was found guilty. Use of the amorphous tautology, "in a proper case," confused rather than elucidated the crucial distinction.

The vague and general questions which served as the basis for disqualification in the case at bar are the antithesis of the "narrowly specified, provable and legally cognizable basis of partiality" which this Court has said forms the basis for challenges for cause. *Swain* v. *Alabama*, 380 U.S. 202, 220 (1965).

Prior to the enactment of Section 743, the Illinois Supreme Court recognized the need for a showing of a connection between a venireman's scruples against the death penalty and his ability to consider all forms of verdict. *Gates* v. *People*, 14 Ill. 433, 434-5 (1853). This requirement was legislatively overturned by the passage in 1869 of Section 743. (Ill. Laws 1869 at 11, § 4.)

Several courts have held (as did the Illinois court in *Gates*) that prospective jurors may not be excluded for cause unless and until it is shown that their views on capital

punishment will preclude them from considering the death penalty if the defendant is found guilty. These cases expressly or implicitly reject the assumption that theoretical opposition to capital punishment, in and of itself, affords a basis for disqualifying veniremen for cause.*

United States v. *Wood*, 299 U.S. 123 (1936), is analogous. This Court held that federal employees are not automatically subject to challenge for cause in cases involving the federal government, and that a showing of actual bias is a predicate to the challenge (299 U.S. at 149):

> ". . . . We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation."

Applying this principle to the case at bar, there can be no rational basis for a conclusive presumption of "implied bias" ("a bias attributable in law to the prospective juror regardless of actual partiality", 299 U.S. at 134) arising

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* *E.g.*, *People* v. *Stewart*, 7 Cal. 140, 143-4 (1857) (error to exclude venireman because he was "opposed to capital punishment on principle"); *Atkins* v. *State*, 16 Ark. 568, 580 (1855) (error to exclude juror who is "opposed to capital punishment"); *Stratton* v. *People*, 5 Colo. 276, 279 (1880) ("Conscientious scruples, to disqualify, must be such as to preclude a finding of guilty in accordance with the law and the evidence"). In *Turberville* v. *United States*, 303 F.2d 411 (D.C. Cir. 1962), cert. denied 370 U.S. 946, the Court of Appeals directed trial judges henceforth to inquire "not merely whether they [veniremen] are opposed to the death penalty but also, if opposed, whether this private sentiment would prevent them from rendering a fair verdict on the basis of the evidence." *Long* v. *United States*, 360 F.2d 829, 834 (D.C. Cir. 1966). See also *Manuel* v. *United States*, 254 Fed. 272, 274 (8th Cir. 1918); *Boyington* v. *State*, 74 Fla. 258, 76 So. 774, 775 (1917); McClelland, "Conscientious Scruples Against the Death Penalty in Pennsylvania," 30 Penn. Bar Ass'n. Quar. 252 (1959).

from conscientious scruples against infliction of the death penalty.

In *Connors* v. *United States*, 158 U.S. 408 (1895), this Court held that questions concerning the political beliefs of prospective jurors were improper in the absence of a showing that those beliefs would prevent the jurors from acting impartially. (158 U.S. at 412-5.)

Most state statutes on this subject expressly require a showing that the venireman's abstract opposition to capital punishment will prevent him either from finding the defendant guilty or from considering imposition of the death penalty if the defendant is found guilty. Only five states—Illinois, Georgia, Louisiana, Alabama and Texas—have enacted statutes which permit exclusion for views alone, unrelated to consideration of the verdict. The statutes are collected in Appendix 2 to this brief.

There is no rational foundation for the unspoken assumption contained in the Illinois statute that the venireman's scruples will necessarily prevent him from according a fair hearing to the state on the penalty issue.

The automatic disqualification of veniremen who in principle opposed the death penalty resulted in three violations of petitioner's rights under the United States Constitution:

—Petitioner's jury was not selected from a full, random cross section of the community (Part B, pages 17 to 28 below);

—Those who remained eligible to serve on the jury were partial to the prosecution on the primary issue of petitioner's innocence or guilt. (Part C, pages 28 to 33 below); and

—The eligible jurors represented a segment of the community which tends to mete out more severe punishments than the excluded veniremen (Part D, pages 33 to 36 below.)

B.

As a Result of the Operation of the Illinois Statute, Petitioner's Jury Was Not Chosen From a Venire Representative of a Fair Cross-Section of the Community As Required By the Sixth and Fourteenth Amendments.

(1)

RELIABLE PUBLIC OPINION POLLS DEMONSTRATE THAT PETITIONER'S JURY WAS NOT SELECTED FROM A RANDOM CROSS SECTION OF THE COMMUNITY.

Authoritative public opinion polls, summarized in Appendix 3 to this brief, disclose that approximately one-half of the adults in this country are opposed to capital punishment. A 1958 Roper poll shows 50% opposed, 42% in favor, and 8% no opinion. A more recent (1966) Gallup poll shows 47% opposed, 42% in favor and 11% no opinion. These percentages are substantiated by the experience in the case at bar, in which approximately 49% of the veniremen were excused for cause because of their theoretical opposition to the denth penalty.*

Thus, a substantial portion of the community was eliminated for abstract opinions on matters of public concern without any showing that these opinions would affect their ability to try the case fairly. The operation of Section 743

* Similarly, in *Irvin* v. *Dowd*, 366 U.S. 717, 727 (1961), over half of the prospective jurors who did not have fixed opinions on the defendant's guilt were challenged for cause by reason of their opposition to the death penalty.

thereby deprived petitioner of a jury chosen from a venire fairly representing a cross-section of the community.

The challenge for cause authorized by Section 743 had the further effect of altering the representation of certain recognized segments of the community on the venire from which the jury was chosen by excluding disproportionately large numbers of certain classes of persons.

Thus, the Roper survey reveals that, while 50% of the total sample opposed capital punishment, 78% of the Negroes polled were in the opposition group. (App. 3, p. 55.) While Roper does not reveal the number of persons of each race questioned, it necessarily follows that among the non-Negroes polled, less than 50% were opposed. Hence, a jury composed only of those who express no opposition to capital punishment is likely to include a substantially smaller percentage of Negroes than either (i) a fair cross-section of the community, or (ii) a jury from which persons opposed to capital punishment have not been automatically excluded.

Similarly, the polls reveal that qualifying a jury for capital punishment has a tendency toward excluding women. In 1966, Lou Harris and Associates, Inc. found that 55% of all persons of both sexes who expressed an opinion were opposed to capital punishment. But among the women polled, 62% were opposed to the death penalty and 38% were in favor. (App. 3, p. 58.) The Harris results are confirmed by Gallup. (App. 3, p. 56.)

Economics are also a factor. Roper finds significantly greater opposition to capital punishment in the lower income brackets. (App. 3, p. 55.) This is confirmed by Gallup, who found that persons with incomes over $7,000

per year were almost equally divided between opponents and proponents of the death penalty, while among those with incomes under $7,000, a substantial majority of those who expressed an opinion were opposed to capital punishment. (App. 3, p. 57.)

Harris also found that city dwellers opposed capital punishment 46% to 33%, with 17% undecided, while suburbanites favored it in almost inverse ratio, 48% to 37%, with 15% undecided. (App. 3, p. 58.)

The political point of view of persons opposed to capital punishment is also a significant factor, since political predisposition shows a general mode of thinking, the type of "imponderable" which the cross-section principle is intended to take into consideration. See *Ballard* v. *United States*, 329 U.S. 187, 193-194 (1946), discussed at page 24 below. The Gallup Poll indicates that the operation of Section 743 tends to exclude Democratic and independent voters, and to include Republicans. (App. 3, p. 57.)

From the foregoing summary it becomes clear that the persons excluded by Section 743 were most likely to be females, Democrats, Negroes, and persons from the lower economic bracket, or combinations thereof. The remaining veniremen, from whom petitioner's jury was drawn, were likely to be white, male, Republican and persons from the upper income groups. It is obvious, therefore, that petitioner was not afforded an opportunity to select the jury from a venire composed of a full, fair and random cross-section of the community.

We do not contend that the Illinois statute was deliberately designed for the purpose of excluding Negroes, Democrats, women, or persons in the lower economic groups from juries. But the practical effect of the oper-

ation of the statute was to exclude such disproportionate percentages of these groups that petitioner was denied his constitutionally protected right to a jury composed of a fair cross-section of the community.

(2)

THE DUE PROCESS CLAUSE REQUIRES THAT STATE COURT JURIES BE SELECTED FROM A RANDOM CROSS SECTION OF THE COMMUNTY.

This Court has held that a fair trial requires an impartial or neutral jury. *Parker* v. *Gladden,* 385 U.S. 363, 364 (1966); *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961); *Fay* v. *New York,* 332 U.S. 261, 288-89 (1947). We submit that this Court should now hold that the United States Constitution requires not only lack of bias or prejudice in the particular case, but also that the jury be chosen from a venire fairly representative of a cross-section of the community. On several occasions, in *dicta,* this Court has indicated that the Due Process Clause of the Fourteenth Amendment imposes this requirement upon those states, such as Illinois, which provide jury trials in criminal cases. (Illinois Constitution Art. II, § 5.) The issue here is not whether the Constitution requires the states to afford a jury trial in all criminal cases (see *Duncan* v. *Louisiana,* No. 410). "The question, rather, goes to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord. . . ." *Turner* v. *Louisiana,* 379 U.S. 466, 471 (1965).

In *Smith* v. *Texas,* 311 U.S. 128, 130 (1940), this Court said:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

In *Brown* v. *Allen,* 344 U.S. 443, 474 (1953) this Court said that the Due Process Clause requires that state-court juries be selected from a source which "reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." This salutary principle has often been applied by this Court in voiding state jury selection procedures which purposefully exclude persons by reason of their race or national origin. *Strauder* v. *West Virginia,* 100 U.S. 303, 308-10, (1880); *Hernandez* v. *Texas,* 347 U.S. 475, 481-2 (1954).

In *dicta* in *Hoyt* v. *Florida,* 368 U.S. 57, 59-60 (1961), this Court stated:

> " . . . the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions which 'single out' any class of persons 'for different treatment not based on some reasonable classification.' *Hernandez v. Texas,* 347 U.S. 475, 478."

The Due Process Clause does not require a jury which is whitewashed of all opinions and sentiments which might subtly influence the verdict. But it does require that the jury be selected in such a way as to insure that the opinions and sentiments current in the community are fairly balanced, so long as those views will not give rise to actual, demonstrable bias to one side or the other. As indicated by Judge Learned Hand, this means that the venire is to be a *random* sample of the *community as a whole. United States* v. *Dennis,* 183 F.2d 201, 224 (2d Cir. 1950); aff'd. 341 U.S. 494 (1951).

Where, as is the case under Section 743, a substantial segment of the community is arbitrarily excluded without any showing of actual bias or prejudice in the particular case, the requirements of the Due Process Clause have not been met.

(3)

THE EQUAL PROTECTION CLAUSE PROHIBITS INVIDIOUS DISTINCTIONS IN THE SELECTION OF STATE COURT JURIES.

Section 743 runs afoul of the Equal Protection Clause as well as the Due Process Clause. Section 743 applied only in murder cases and then only when the prosecutor "qualified" the jury for capital punishment. In all other criminal cases, persons were qualified to serve on juries without regard to their views on capital punishment.

A state may not vest unfettered discretion in its prosecutors to determine which defendants shall receive trial by cross-section juries and which shall not. All defendants charged with the same type of offense are entitled to the same kind of trial. *Fay* v. *New York,* 332 U.S. 261, 285 (1947). Nor should the representative character of the jury vary with or depend upon the crime charged.

Since Illinois provides a jury trial to all criminal defendants, it cannot arbitrarily deprive some defendants of a jury chosen from a fair cross-section of the community. Cf. *Turner* v. *Louisiana,* 379 U.S. 466, 471 (1965); *Douglas* v. *California,* 372 U.S. 353, 356-57 (1963); *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956).

(4)

CASES RELATING TO FEDERAL COURT JURIES PROVIDE GUIDELINES FOR THE TYPE OF JURY WHICH THE FOURTEENTH AMENDMENT REQUIRES THE STATES TO PROVIDE.

In several cases dealing with federal courts, this Court has held that juries must be selected from a random and

fair cross section of the community. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946); *Ballard* v. *United States*, 329 U.S. 187 (1946); *Glasser* v. *United States*, 315 U.S. 60 (1942), discussed below. Cases such as these, in which this Court has exercised its supervisory power over trials in federal courts, have frequently been held to provide guidelines for the due process requirements applicable to the states. See, for example, *Washington* v. *Texas*, 388 U.S. 14, 22 (1967); *Spencer* v. *Texas*, 385 U.S. 554, 572-74 (1967) (separate opinion of Chief Justice Warren); *Mapp* v. *Ohio*, 367 U.S. 643, 654-57 (1961).

In *Glasser* v. *United States*, 315 U.S. 60 (1942) this Court dealt with selection of federal court juries, but used language applicable as well to jury selection procedures in state courts (315 U.S. at 86):

> ". . . our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. . . . Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties."

Discussing federal juries in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946), this Court said:

> "The American tradition of trial by jury, considered in connection with either criminal or civil pro-

ceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.' "

Also analogous to the issue presented here is *Ballard* v. *United States*, 329 U.S. 187 (1946), involving exclusion of females from federal court juries. The government argued that an all-male panel would be just as representative of the community as a panel which included women. This Court held that women carry to the jury-room a unique viewpoint which the defendant is entitled to have represented on the jury (329 U.S. at 193-94):

> "... it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables."

So too, even if the persons who oppose the death penalty cannot be shown to act as a class, or have any distinguishing characteristics other than their views on the death penalty, these persons are entitled to sit on juries in capital cases, and petitioner is entitled to have his jury drawn from a cross-section which includes them. Exclusion for their theoretical views alone, unrelated to their actual ability to be fair to both the prosecution and defense, is just as senseless as exclusion by reason of sex. And if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all persons *favoring* capital punishment were intentionally and systematically excluded from jury service in murder cases?

(5)

THE PRINCIPLES EXPRESSED BY THE DISSENTERS IN FAY v. NEW YORK, 332 U.S. 261 (1947) ARE APPLICABLE TO THE CASE AT BAR.

In *Fay* v. *New York*, 332 U.S. 261 (1947), the New York "blue ribbon" jury system was challenged on the ground that its practical result was to exclude a disproportionate number of persons in certain socio-economic groups and thus deprive the defendant of a jury drawn from a cross-section of the community. In many respects the problems presented in *Fay* are similar to those in the case at bar.

A majority of the Court in *Fay* held that the state's manner of selecting veniremen for the blue ribbon juries was not so unfair or prejudicial to defendants that it violated the Fourteenth Amendment. The majority refused to apply the Sixth Amendment jury trial provisions to the states. (332 U.S. at 283-8.) The majority also held that the Fourteenth Amendment does not require state-court juries to have proportional representation of persons from lower income groups. (332 U.S. at 291-2.) But the majority agreed that "a system of exclusions could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process . . .. The defendant's right is a neutral jury." (332 U.S. at 288-9.)

The majority's views as to the meaning and effect of the proof affords a sound basis for distinguishing the majority opinion in *Fay*. The dissenters, however, viewed the record as reflecting the kinds of groundless discriminations which petitioner complains of in the case at bar. Accordingly, petitioner submits that Mr. Justice Murphy's dissenting opinion in *Fay*, joined by Justices

Black, Douglas and Rutledge, eloquently expresses the principles which should be applied in this case (332 U.S. at 296, 299-300):

> "The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community.
>
> • • •
>
> ". . . The proof here is adequate enough to demonstrate that this panel . . . suffers from a constitutional infirmity. That infirmity is the denial of equal protection to those who are tried by a jury drawn from a 'blue ribbon' panel. Such a panel is narrower and different from that used in forming juries to try the vast majority of other accused persons. To the extent of that difference, therefore, the persons tried by 'blue ribbon' juries receive unequal protection.
>
> ". . . there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. . . . [The jury] is a democratic institution, representative of all qualified classes of people. *Smith* v. *Texas, supra* [311 U.S. 120 (1940)]. To the extent that a 'blue ribbon' panel fails to reflect this democratic principle, it is constitutionally defective.
>
> "The Court demonstrates rather convincingly that it is difficult to prove that the particular petitioners were prejudiced by the discrimination practiced in this case. Yet that should not excuse the failure to comply with the constitutional standard of jury selection. We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. . . . But it is no less real or meaning-

> ful for our purposes. If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should vindicate that right even though the effect of the violation has not yet put in a tangible appearance. . . ."

See also *Labat* v. *Bennett*, 365 F.2d 698, 724-5 (5th Cir. 1966), cert. denied 386 U.S. 991.

Almost 50% of the population was excluded from petitioner's jury because of abstract views on capital punishment, (i) without any showing that the jurors thus excluded could not be fair to the state on the issues to be presented in the case, (ii) thus excluding a disproportionate segment of certain recognizable racial, social and economic groups. It is as though all those who agree with this Court's recent decisions on police interrogation were excused for cause by the prosecution. The veniremen's viewpoints on subjects of current concern and interest cannot serve to disqualify them from the jury. And if prospective jurors are disqualified for cause by reason of their abstract opinions, the remaining veniremen cannot be deemed fairly representative of a cross section of the community.* Here, fully one-half of the community was excluded by reason of abstract views on a current and controversial topic. Since there was no rational foundation for this exclusion, the operation of the Illinois statute deprived petitioner of his right under the United States

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* "It seems unreasonable to expect that mature persons will not have considered these broad social questions until they became jurors. It seems unjust to hold that one conscientious group which has considered and concluded in favor of the death penalty is fit to serve as jurors while an equally conscientious group having concluded against the death penalty is unfit." Jewel, "The Death Penalty—A Suggestion for California", 36 J.S.B. Calif. 240 (1961).

Constitution to be tried by a jury chosen from a cross-section of the community.

Since exclusion of a major class of persons from the jury deprived petitioner of the fair and representative cross-section of the community to which he was entitled, it is unnecessary to show that the persons remaining on the panel were partial to the prosecution or could not render a fair verdict. The long line of jury discrimination cases, beginning with *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), all recognize that if a class has unlawfully been excluded from the jury, a new trial is required, without reference to the composition or apparent fairness of the venire or of the jury which actually tried the case. This Court has emphasized that where federal constitutional rights are involved, a reasonable possibility of prejudice alone is sufficient to warrant reversal of a criminal conviction. *Chapman* v. *California*, 386 U.S. 18, 22-24 (1967).

Accordingly, the arguments concerning "prosecution proneness," presented in Parts C and D below are independent of and in addition to the contentions presented above concerning a representative cross-section jury. Adoption of any of these positions should result in reversal of petitioner's conviction.

C.

Exclusion For Cause of All Veniremen Having Scruples Against the Death Penalty Assured the State of a Jury Whose Members Were Partial To the Prosecution on the Issue of Innocence or Guilt, In Violation of Petitioner's Constitutional Rights.

This Court has recognized that the Due Process Clause of the Fourteenth Amendment assures state court defen-

dants of trial before "a neutral jury." *Fay* v. *New York*, 332 U.S. 261, 288-9 (1947). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The command of the Sixth Amendment that the jury be "impartial" is applicable to the states. *Parker* v. *Gladden*, 385 U.S. 363, 364 (1966).

The exclusion of all persons having scruples against infliction of the death penalty necessarily results in a jury none of whose members has such scruples. Recent scientific studies have confirmed what experienced prosecutors and defense lawyers have known all along: *persons having no scruples against the death penalty tend to favor the prosecution on the issue of innocence or guilt.* They are more likely to find the defendant guilty than those who entertain reservations about infliction of the death penalty. The two classes are not fungible where the innocence-guilt issue is involved, and the difference works to the decided advantage of the state.

In 1961, Professor Walter E. Oberer, writing in the Texas Law Review, pointed out that the exclusion of scrupled jurors in capital cases results in a jury which is more favorable to the prosecution on the question of innocence or guilt than a jury selected from the community as a whole. Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?" 39 Texas L. Rev. 545 1961). Professor Oberer stated (39 Tex. L. Rev. at 549):

> "The consequence [of excluding scrupled jurors] is that a jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members. Human sympathy is hard-

> ly subject to nice compartmentalization. Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach."

Oberer's article was based upon a well recognized study in the psychological sciences, Adorno, et al., The Authoritarian Personality (Harper, 1950).

Several empirical studies have now been completed which verify the validity of Professor Oberer's position. In 1964 Dr. W. Cody Wilson, Professor of Educational Psychology at the University of Texas, conducted a survey in which approximately 200 subjects were studied in order to determine whether persons who believe in capital punishment differ from persons with scruples against capital punishment in terms of (a) tendency to find the defendant guilty, (b) confidence in their opinions respecting guilt or innocence, (c) the degree of punishment recommended (excluding the death penalty), (d) bias in favor of the prosecution and against the defense, and (e) bias against insanity as a defense plea. The study was conducted by presenting a series of hypothetical cases to each of the subjects. The subject was then required to vote "innocent" or "guilty" on the basis of the facts presented and, if he voted guilty, to assess the punishment at death or imprisonment for any period of years. In addition, the subject was required to state whether he agreed or disagreed with each of a series of statements designed to test his "prosecution proneness," such as "The District Attorney's interpretations of the facts in a criminal case are usually more reliable than the defense lawyer's," or "If two witnesses gave conflicting testimony in a criminal case, I would believe the witness for the prosecution rather than the wit-

ness for the defense." Each subject was also required to state whether he had conscientious scruples against capital punishment.

The results of Professor Wilson's study demonstrate that jurors who have no scruples against the death penalty have a tendency to favor the prosecution on the issue of innocence or guilt to a greater degree than the community as a whole. For example, among "scrupled" jurors deciding innocence or guilt in 6 hypothetical cases, 21% found the defendant not guilty in 4 or more of the hypotheticals, whereas only 9% of the "non-scrupled" jurors found the defendant not guilty in as many as 4 cases. Conversely, 30% of the non-scrupled jurors found the defendant guilty in 5 or 6 of the 6 cases presented, while only 17% of the scrupled jurors found the defendant guilty in as many as 5 or 6 of the same cases. A significantly disproportionate relationship was also discovered to exist between scrupled and non-scrupled jurors in each of the other areas tested. From the scientific data collected, Dr. Wilson concluded:

> ". . . a jury selected by systematically excluding people who have scruples against capital punishment is biased in the direction of being more likely to bring a verdict of guilty, being more confident of this decision of guilt, favoring the prosecution in opposition to the defense, being prejudiced against the plea of not guilty by reason of insanity, and assessing a more severe punishment excluding the death penalty." (Appendix 4, p. 65.)

Dr. Faye Goldberg, Assistant Professor of Psychology at Morehouse College, surveyed 200 male and female college students, 100 Negro and 100 white, by asking them to vote guilty or not guilty and assess punishment in 16 hypothetical cases. The Goldberg study again confirmed that persons expressing no scruples against the death penalty were more likely to vote guilty in a given factual

situation than persons expressing such scruples.* (Appendix 4, pp. 66-67.)

Pertinent portions of the studies referred to above are included in Appendix 4 to this brief.

This Court may take judicial notice of these scientific studies, especially since they reflect and confirm the practical experience of judges and lawyers. *Brown* v. *Board of Education,* 347 U.S. 483, 494 (1954). Pursuant to settled mathematical principles, the Court may and should assume that the operation of Section 743 created a prosecution prone jury in petitioner's case. See Finkelstein, "The Application of Statistical Decision Theory To the Jury Discrimination Cases," 80 Harv. L. Rev. 338, 349-373 (1966).

These studies demonstrate through scientific methods what the practicing criminal bar has long known. It is for this reason that prosecutors often "qualify" the jury for the death penalty by excluding for cause those who have scruples, but do not thereafter ask the jury to return the death verdict. The advantage thus achieved is a jury *more likely to convict* than one leavened with those who are in principle opposed to capital punishment.

The "prosecution prone" attitude of non-scrupled jurors differentiates this case from the holding of the Court in *Fay*

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* The Goldberg study also confirms that a higher percentage of Negroes have scruples against the death penalty than non-Negroes. Dr. Goldberg found that 76% of the Negroes expressed scruples while only 47% of the whites expressed such scruples. See Part B(1) above. The Goldberg study also shows that a substantial number (42%) of the persons who expressed scruples against the death penalty nevertheless imposed the death penalty in one or more of the hypothetical cases, thus demonstrating the proposition advanced in Part A above that jurors who express conscientious scruples against the death penalty are not necessarily indicating that they would never assent to capital punishment.

v. *New York,* 332 U.S. 261 (1947), in which the majority said (332 U.S. at 291-2):

> "No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it."

In contrast, in the case at bar there was a wide gulf in the differing viewpoints of the veniremen who were excluded for cause and those who remained eligible to serve on petitioner's jury, and the difference was prejudicial to petitioner.

In *Fay,* the majority set forth the principle which controls here (332 U.S. at 285):

> ". . . A state is not required to try all classes of offenses in the same forum. But a discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be 'equal protection of the laws.' . . ."

The irony of this situation is that while purporting to exclude those who cannot be fair on the question of punishment, the state is assured of a jury which is likely to be biased in its favor on the innocence-guilt phase of the trial. This system is constitutionally impermissible.

D.

As A Result of the Operation of Section 743, the Venire From Which Petitioner's Jury Was Selected Was Stripped of Persons With Moderate and Humane Views Toward Punishment, and Was Comprised of Persons Who Were Partial To the Prosecution On the Penalty Phase of the Trial.

At the time petitioner was tried, Illinois law provided that upon finding the defendant guilty of murder, the jury must fix a penalty of (i) imprisonment for any term of 14 years or more, (ii) imprisonment for life, or (iii) death by electrocution. (Ch. 38, § 360, Ill. Rev. Stat. 1959.)

In the *voir dire*, the prosecutor repeatedly emphasized his objective of obtaining a verdict of "death in the chair." In order to escape challenge for cause, the veniremen were required explicitly to assure the prosecutor that they would consider the extreme penalty in the event petitioner was found guilty, and vote to impose that penalty if the evidence warranted. The prosecutor's refrain of "death in the chair" rang out incessantly during the selection of the jury. The venire from which petitioner was forced to select his jury was stripped of every person who expressed even the most modest and theoretical reservations about capital punishment.

In jurisdictions such as Illinois in which death is not a mandatory penalty for murder, a number of courts have upheld the practice of challenging for cause persons having scruples against capital punishment, on the theory that if they are not excluded the state cannot obtain a fair trial on the penalty issue. See Annot., "Beliefs Regarding Capital Punishment As Disqualifying Juror In Capital Case For Cause," 48 A.L.R. 2d 560 (1956). This rationale was adopted by the Supreme Court of Illinois in the case at bar. (36 Ill.2d at 476, 224 N.E.2d at 262.)

This reasoning overlooks the fact that a jury selected from the non-scrupled members of the community is likely to be partial to imposition of severe penalties. The scientists who conducted the studies discussed above have discovered that the persons excluded for cause by reason of their views on the death penalty also hold views toward punishment which are far more moderate and humane than those who have no scruples against infliction of the death penalty; and that quite apart from the tendency of non-scrupled jurors to find the defendant guilty (Part C above) and to impose the death penalty, they tend to impose longer prison sentences under comparable circum-

stances than persons who oppose capital punishment. See Wilson "Belief In Capital Punishment and Jury Performance," Appendix 4, pages 64, 66, and Goldberg "Attitude Toward Capital Punishment and Behavior As A Juror In Simulated Capital Cases," Appendix 4, pages 67-68.

Petitioner was thus deprived of the moderate and humane views toward punishment held by those (fully one-half of the community) who were excluded by reason of their views on capital punishment. In terms of attitudes toward penalties for crimes, the venire was lopsided in favor of the more sanguinary members of the community.

Even if the only issue to be determined by the jury in petitioner's case had been the penalty to be imposed, there was nevertheless no justification for wholesale elimination of prospective jurors for their scruples against capital punishment without any showing that the jurors so excused would refuse to consider all of the possible penalties in accordance with the court's instructions. Since the jury was required to consider a wide range of penalties, it was as unfair to petitioner to eliminate persons who would be reluctant to impose the more severe penalties as it would have been unfair to the state to eliminate all who favored those penalties.

In *Townsend* v. *Burke,* 334 U.S. 736, 740-1 (1948), this Court held that the requirements of the Due Process Clause of the Fourteenth Amendment extend to the penalty fixing stage of state criminal trials as well as to the determination of innocence or guilt. Cf. *In re Oliver,* 333 U.S. 257, 273 (1948); *Frady* v. *United States,* 348 F.2d 84, 98 (D.C. Cir. 1965), cert. denied 382 U.S. 909. The state is not required to have the penalty issue tried by a jury, but if it adopts that procedure, the Fourteenth Amendment requires that the jury which tries that issue be fair and impartial and drawn from a full cross-section of the community.

Last term this Court, specifically noting the critical importance of the sentencing phase of criminal trials, held that the Sixth Amendment right to counsel applies during the sentence-fixing procedure and is enforcible against the states through the Fourteenth Amendment. *Mempa* v. *Rhay,* 389 U.S. 128, 134 (1967).

In the absence of a showing that a particular venireman was, on the one hand, so opposed to capital punishment that he would never consider a death verdict, or, on the other hand, so imbued with the spirit of an "eye for an eye" that he would refuse to consider a penalty less than death if petitioner were found guilty of murder, both those who favored capital punishment and those who opposed it should have been eligible to serve on the jury. Accordingly, even if the issue here were limited to the effect of veniremen's views on the penalty issue, the challenge for cause cannot be sustained without showing that the prospective jurors' scruples would prevent them from considering the death penalty in any case. Through the operation of Section 743, the venire from which petitioner's jury was selected did not represent a fair cross-section of the community on the penalty issue, and was unquestionably biased in favor of the prosecution on that issue, in violation of the petitioner's rights as guaranteed by the jury trial provisions of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

E.

Prior Federal Cases Distinguished.

In *Logan* v. *United States,* 144 U.S. 263 (1892), the defendants were indicted for murder, for which the jury fixed the penalty. (See 144 U.S. 264-5, 276.) The *voir dire* questions which served as the basis for the government's challenge for cause were quite similar to those asked in

the case at bar. (See 144 U.S. at 270.) However, no argument was made that exclusion of scrupled jurors violated the defendants' constitutional rights; the defendants argued that it was reversible error to exclude them. The Court *assumed* that a juror's conscientious scruples against infliction of the death penalty would "prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence . . ." (144 U.S. at 298.) This is analogous to the assumption of "implied bias" which the Court indulged as to the government employees in *Crawford* v. *United States,* 212 U.S. 183, 192-6 (1909), which was seriously undermined if not overruled in 1936 in *United States* v. *Wood,* 299 U.S. 123, 139-141 (1936), discussed above at page 15.

The two cases relied on in *Logan* are distinguishable. In *United States* v. *Cornell,* 25 Fed. Cases 650, 655-6 (No. 14,868) (C.C.R.I., 1820), death was the mandatory penalty for the crime involved. Two veniremen who were members of the Quaker faith "excepted to themselves as disqualified, because they were conscientiously scrupulous of taking away life, and did not think themselves impartial in a capital cause . . . " Likewise, in *United States* v. *Wilson,* 28 Fed. Cases 699, 701 (No. 16,730) (C.C.Pa. 1830), the death penalty was mandatory, and the venireman in question stated that "he had conscientious scruples against giving a verdict which in its consequences might be the means of taking away the life of the prisoners . . . "

Several cases decided by Courts of Appeals are likewise distinguishable. In *United States* v. *Puff,* 211 F.2d 171, 180 (2d Cir. 1954) cert. denied 347 U.S. 963, and *Pope* v. *United States,* 372 F.2d 710, 724 (8th Cir. 1967), the prospective jurors were expressly asked whether their scruples against capital punishment would have an effect on their verdict. In *Gillars* v. *United States,* 182 F. 2d 962, 980 (D.C. Cir. 1950), a juror volunteered that her

views concerning capital punishment would prevent her from rendering a fair verdict, whereupon she was excused.

United States ex rel. Dukes v. *Sain*, 297 F.2d 799, 802-803 (7th Cir. 1962), cert. denied 369 U.S. 868, dealt with the Illinois practice here in question.

Where, as here, half of the community is excluded for mere abstract views, with the consequences described above, the result is so patently unfair and unjustified as to infringe upon those basic concepts of justice and fair trial which are inherent in a civilized society and which are guaranteed to all citizens by the Fourteenth Amendment Due Procees Clause itself.

II.

EVEN IF SECTION 743 WERE CONSTRUED TO REQUIRE THE STATE TO ESTABLISH, AS A PREREQUISITE TO EXCLUSION FOR CAUSE, THAT A VENIREMAN'S SCRUPLES AGAINST THE DEATH PENALTY WOULD AFFECT HIS VERDICT ON THE PENALTY ISSUE, THE STATUTE IS NEVERTHELESS INVALID BECAUSE IT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO HAVE THE ISSUE OF HIS INNOCENCE OR GUILT TRIED BY A JURY DRAWN FROM AN IMPARTIAL CROSS SECTION OF THE COMMUNITY.

A.

Petitioner Had a Constitutional Right to Have Persons With Scruples Against the Death Penalty Eligible To Serve On the Jury Which Determined His Innocence Or Guilt.

Even if (contrary to fact) Section 743 were interpreted to exclude only those persons who would refuse to consider or sign a death penalty verdict in any case, the views of those persons would come into play only on the

penalty phase of the case, if that phase were ever reached. The scruples of individual jurors as to the penalty could have no effect on their ability to be fair to the state on the threshold issue of innocence or guilt. The views of the scrupled jurors would tend to balance the views of the non-scrupled jurors who are prone to the prosecution on the innocence-guilt phase of the trial, thus creating a jury which is truly representative of the community as a whole in its attitudes toward both prosecution and defense.* This balancing is envisaged by our laws and required by the Constitution.

As demonstrated in Parts I B and C above, the exclusion of scrupled jurors pursuant to Section 743 deprived the defendant of a jury drawn from a full and fair cross-section of the community and resulted in the selection of a jury which, when compared with the community as a whole, was disproportionately biased in favor of the prosecution on the issue of innocence or guilt. Thus, Section 743 operated to deprive petitioner of his right to trial before an impartial jury drawn from a fair and full cross-section of the community, as guaranteed by the Sixth Amendment and the Fourteenth Amendment Due Process Clause.

Moreover, the operation of Section 743 violated petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment, because it created arbitrary and unreasonable classifications and distinctions among defen-

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* The practice of excluding scrupled jurors originated when the death penalty was mandatory punishment for murder. See, *e.g.*, *United States* v. *Cornell*, 25 Fed. Cases 650 (No. 14,868) (C.C.R.I. 1820). Under those circumstances there may well have been reason to believe that scruples against the penalty might prevent a juror from giving the state a fair trial on the innocence-guilt issue. Illinois repealed the mandatory death penalty in 1867, two years before Section 743 was enacted. (Ill. Laws 1867 at 90.)

dants, to the substantial detriment of those such as petitioner. Defendants indicted for crimes other than murder, and those indicted for murder where the state did not elect to qualify the jury for the death penalty, were afforded juries untainted by the limiting and prejudicial effects of the exclusionary rule. Surely the kind of crime for which a man is indicted, or the whim of the prosecutor as to whether to seek the ultimate penalty, affords no justification for denying a few defendants an impartial, cross-section venire. Cf. *Douglas* v. *California*, 372 U.S. 353, 356-7 (1963); *Griffin* v. *Illinois*, 351 U.S. 12, 18-19 (1956); *Fay* v. *New York*, 332 U.S. 261, 285 (1947).

Exclusion for cause of scrupled jurors tainted the fact-finding body at petitioner's trial and deprived petitioner of his constitutional right to have an impartial jury decide his innocence or guilt.

B.

The Double-Issue Trial Procedure Established By the Illinois Legislature Cannot Serve To Justify Violation of Petitioner's Constitutional Right To An Impartial Cross-Section Jury.

Assuming, as we must for the purposes of this case, that the state has the right to impose death as one of the punishments for crime, that right nevertheless cannot and does not transcend petitioner's right to a fair trial under the Constitution on the question of his innocence or guilt. The state may not use its request that the jury impose the death penalty as an excuse for denying petitioner his right to trial on the innocence-guilt issue by an impartial jury selected from a full and fair cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments. The defendant's right to a fair trial on the question of his innocence or guilt far outweighs the state's interest in seeking to persuade the jury to impose any particular penalty in the event the defendant is found guilty.

Violation of petitioner's constitutional rights is the direct result of the double-issue trial system which Illinois created for certain felony cases. Under this procedure, the innocence-guilt issue was tried *at the same time* as the penalty issue. It is this system which created the conflict between petitioner's right to an impartial cross-section jury, and the state's desire to exclude those who would not consider the death penalty. Having established this system, the state may not "bootstrap" by using the existence of the system to force petitioner to trial on the issue of innocence or guilt before a non-representative, prosecution prone jury from which one-half of the community has been excluded solely by reason of their views on the penalty issue. This is particularly true where, as demonstrated above, the exclusion deprived petitioner of a jury composed from a fair cross-section of the racial, social and economic groups which make up the community, and forced him to accept a jury which was partial to the prosecution on the innocence-guilt issue.

Since the state has created the dilemma between petitioner's right to have all impartial persons eligible to serve on the jury on the innocence-guilt issue, and the state's interest in excluding some of those persons as to the penalty phase of the case, the state cannot require petitioner to bear the adverse and unconstitutional effects of the dilemma. Rather, the state must either accept the burdens which arise out of the system it has created, or conform its system to constitutional requirements.

No irreconcible conflict exists between petitioner's right to a fair trial on the innocence-guilt issue, and the state's interest in urging the jury to impose the death penalty. Changes already made in the Illinois Criminal Code have

corrected a part of the problem (see footnote at page 4), and a further alteration in procedure can fully reconcile the competing interests.

The state may avoid the dilemma created by its double-issue procedure by investing the judge with the sentencing function in all cases, without the jury fixing the penalty, or by providing for bifurcated trials.* But so long as

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* Sound independent reasons indicate that the sentencing should be placed in the hands of the judge, who will be fully advised of the pertinent facts and more experienced and capable of determining an appropriate sentence consistent with all of the circumstances, thus advancing the desirable end of establishing logic and consistency in sentences. "At common law the jury returned a verdict of guilty or not guilty, and the punishment was fixed by the court and governed by the laws in force. (2 Blackstone, book 4, 361.)" *George* v. *People*, 167 Ill. 447 (1897) at p. 457.

A number of states already have adopted the bifurcated trial. Cal. Pen. Code § 190.1 (Supp. 1967); Conn. Gen. Stat. Rev. § 53-10 (Supp. 1965); N. Y. Pen. Code § 125.35 (1967); Pa. Stat. Ann. Tit. 18, § 4701 (1963); Tex. Code Crim. P., Art. 37.07 (Supp. 1967). See also "The Two-Trial System In Capital Cases," 39 N.Y. U. L. Rev. 50 (1964).

Indeed, the double-issue procedure may well be constitutionally invalid in and of itself for the reason that it deprived petitioner of an opportunity to introduce evidence in mitigation before sentence was imposed upon him. Under Illinois practice at the time of petitioner's trial, the only defendants who were denied the right of allocution were those indicted for murder and certain other major crimes *who exercised their right to trial by jury*. (Ch. 38, § 801, Ill. Rev. Stat. 1959.) This was (i) an arbitrary and unreasonable classification violative of the Equal Protection Clause, (ii) a penalty imposed upon those who exercise a constitutional right similar to that condemned in *United States* v. *Jackson*, 262 F. Supp. 716 (D. Conn. 1967), now under consideration by this Court as No. 85, and (iii) a violation of the Due Process Clause, which includes the sentencing phase of the trial. *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948).

Illinois retains any vestige of the procedure under which these two issues are tried together by the jury, the Constitution requires the state to forego its challenge for cause of scrupled jurors. The alternative is to callously and unnecessarily sacrifice the defendant's right to a fair trial on the issue of innocence or guilt to the state's increasingly questionable and unpopular interest in obtaining the death penalty. This result, we submit, is contrary to the rights guaranteed by the Sixth Amendment as applied through the Fourteenth Amendment as well as to basic concepts of fairness in the trial of criminal cases.

Conclusion

The decision of the Supreme Court of Illinois should be reversed and this cause remanded with instructions to order petitioner's release unless the State of Illinois affords him a new trial within a reasonable time.

Respectfully submitted,

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March 11, 1968

APPENDIX 1

EXCERPTS FROM VOIR DIRE EXAMINATION

Questions herein are put by Assistant State's Attorney unless otherwise indicated.

636 CLIFFORD SALAZAR

640 Q. And, in this State, the penalties prescribed by law, which the jurors must consider in every case where 641 the charge is murder, is death in the chair, life, fourteen years or any number of years more than fourteen. Do you understand that?

A. Yes, sir.

Q. Now, is there anything about the fact that you, as a juror, would have the duty to determine guilt or innocence and also fixing a penalty which you feel would be an unusual or difficult burden for you to assume?

A. Not that I know of.

* * *

642 Q. Now, listen carefully to what I'm asking you. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. I don't understand the question.

The Court: Q. What he means by that is: If the evidence in this case convinces you the defendant should be subjected to the death penalty, is there anything in your background, religious scruples or otherwise, that would hinder you from rendering such a verdict; that is, providing the evidence warranted it? 643 That's what counsel means.

A. I can't answer that question. I don't know what you mean.

The Court: You have to answer it.

State it to him again. Probably he doesn't understand it. You can probably explain it better than I can. Go ahead, counsel.

Mr. Kissane: Q. What the Judge is asking and what I'm asking—

And, as the Judge indicated, you must answer these questions so we can determine and you can determine if you should serve as a juror in this case. Do you understand that?

A. Yes.

Q. That's preliminary. What the Judge and I are asking is this: If you're one of the twelve jurors, our testimony will be developed on the witness stand, and then, when all the witnesses are through testifying, his Honor, Judge Salter, will give you the rules of law that apply to a charge such as this, and then you and the other eleven would retire to the jury room. And if it should be your opinion, along with the other eleven jurors, all twelve of you agree that the defen-
644 dant Witherspoon is guilty of murder and that death in the chair is a proper verdict, would you say so by signing a guilty verdict?

A. No, sir.

The Court: In other words, you don't believe that you would vote to inflict the death penalty in any case?

A. No.

Q. In other words, what counsel is getting at is this: If you have a conscientious or religious scruple against the infliction of the death penalty, say so to the gentleman.

A. Yes, sir.

• • •

644 JOSEPH E. SANDERS

645 The Court: Q. . . . Do you have any conscientious scruples against the infliction of the death penalty in a proper case?

A. No, sir.

• • • •

649 Q. Do you understand, sir, that if you're one of the twelve jurors in this case, the penalties you are required to consider as a juror are death in the chair, life or any number of years more than fourteen? Do you understand that?

A. Yes, I do.

Q. Now, is there anything about those penalties that would affect your service here as a juror?

A. No, sir.

• • • •

650 Q. Now, do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. No, sir.

Q. If you're one of the twelve jurors and you have heard all the evidence testified to on the witness stand, the rules of law as given by the presiding judge, you
651 retire to the jury room and it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of the charge of murder, and death in the chair is a proper verdict in this case, under the law and the evidence, would you say so by signing a guilty verdict?

A. Yes, sir.

• • • •

651 CARRIE B. McCRAY

• • •

653 Q. Do you have any prejudice against the death penalty in a proper case?

A. No, sir.

• • •

Mr. Kissane: Do you have conscientious or religious scruples against the infliction—

654 The Court: She has already answered that. She said "No." She said, in a proper case, she has no conscientious scruples against the infliction of the death penalty.

• • •

655 Q. And if the State proves the defendant guilty of the charge of murder and it should be your opinion, along with the other eleven jurors, that the defendant is guilty of murder and the proper penalty under the law and the evidence in this case is that of death in the chair, would you say so by signing a guilty verdict?

A. Yes, sir.

Q. And fixing the penalty at death in the chair?

A. Yes.

• • •

RUTH ANNA O'REILLY

• • •

657 Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. No, sir.

• • •

659 Q. If you're one of the twelve jurors, Mrs. O'Reilly, and all the testimony has been completed on the witness stand, and his Honor has instructed you, and you

retire to the jury room, and it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of murder and that death in the chair is a proper verdict in this case, would you so say by signing a guilty verdict?

A. Yes.

Q. And fixing the penalty at death in the chair?

A. Yes, sir.

* * *

660 BERTHA PRITCHARD

* * *

661 Q. Do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. I do.

Mr. Kissane: Cause, Judge.

The Court: All right, stand aside.

(Juror excused.)

* * *

The Court: Q. Now, counsel, I suggest that you ask that question at the very first. There's no need to question a juror for five minutes and then find out that the juror has a religious scruple against the death penalty. Get that out of the way first.

PETER F. COSENZA

* * *

Q. Do you have a conscientious or a religious
662 scruple against the infliction of the death penalty in a proper case?

A. Yes.

Mr. Kissane: Cause, Judge.

The Court: All right, step aside.

(Prospective juror excused.)

* * *

JOHN M. KRIZ

* * *

663 The Court: Let's get these conscientious objectors out of the way, without wasting any time on them. Ask him that question first.

Mr. Kissane: Yes, sir.

Q. Mr. Kriz, do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. No, not in a proper case.

Q. Now, if it should be your opinion, along with the other eleven jurors, and you're one of the twelve in this case, do you understand that the only thing you are to consider is what the facts are as to what is testified to under oath and that then you follow the rules of law as given by his Honor Judge Salter and you retire to the jury room and, based on the evidence as you have heard it here in the courtroom, the rules
664 of law as given by the presiding judge, it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of murder and that the proper penalty is that of death in the chair, would you so say by signing a guilty verdict?

A. Yes, sir.

* * *

665 Q. Do you understand, sir, that in this particular type of case, where the charge is murder, the jury has a two-fold function, to determine the guilt or innocence of a particular defendant and also to fix a pen-
666 alty prescribed by law? And in this State the penalties are death in the chair, life, fourteen years or any number of years more than fourteen, such as 199 or a 100 years. You understand that, don't you?

A. Yes, sir.

Q. Is there anything about those penalties, that you are required to consider under your oath as a juror, that would affect your service here?

A. Would mind repeating that?

Q. Yes. Is there anything about the fact that the penalties you're required to consider in this State, namely, death in the chair, life, any number of years more than fourteen, that would affect your service here as a juror?

A. No, sir.

* * *

667 VIOLET C. LAYMAN

* * *

668 Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. Yes, I do.

The Court: Now, you see, you should have asked that first.

Step aside.

(Prospective juror excused.)

* * *

VICTORIA HETZEL

* * *

669 Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. No, sir.

* * *

672 Mr. Kissane: Q. Now, if you're one of the twelve jurors and it should be your opinion, based on the evidence as you hear it testified to on the witness

stand, the rules of law as given by his Honor, and you're back in the jury room and it should be your opinion, along with the other eleven, that Witherspoon is guilty of murder and, based on the evidence and the law in this case, death in the chair is the proper verdict, would you so say by signing a guilty verdict?

A. I would, sir.

Q. And by fixing the penalty at death in the chair?

A. Yes, sir.

682 CASIMIR A. MLYNIEC

• • •

684 Prospective Juror Mlyniec: I couldn't go all the way, though, because I couldn't see to put a man to death.

Mr. Cronin: Cause, your Honor.

Mr. Cernek: Let the State inquire.

The Court: Q. In other words, you have a con-
685 scientious scruple against the infliction of the death penalty in a proper case?

Juror Mlyniec: Yes, sir.

The Court: Q. Regardless of the evidence. In no case would the evidence be strong enough to satisfy you that the death penalty should be inflicted?

A. Yes, sir.

The Court: All right, challenge for cause. Step aside.

(Prospective juror excused.)

• • •

685 OLEH KURITZA

Mr. Cernek: Q. Would the gentleman give me your name?

A. Oleh Kuritza, K-u-r-i-t-z-a.

I want to make a statement. I do not believe in capital punishment.

Mr. Cronin: Cause, your Honor.

The Court: Q. Is that a correct statement of your beliefs?

A. That's a correct statement, your Honor.

Q. Or do you want to get off this jury?

A. No. This is my conscientious objection.

686 The Court: All right, a challenge for cause is granted.

(Prospective juror excused.)

* * *

GENEVIEVE WISNIEWSKI

The Court: Counsel, if you will permit me.

Q. Do you have any conscientious scruples or any religious scruples against the infliction of the death penalty in a proper case?

A. Yes, sir.

Q. You do?

A. Yes.

687 Mr. Cronin: Cause, your Honor.

The Court: Challenge for cause is granted. Step aside.

(Prospective juror excused.)

MARIE STELLA

* * *

The Court: Q. Let me cut in here and let me ask you this question: Do you have any religious or conscientious scruples against the infliction of the death penalty?

A. No.

Q. It isn't proper for a defense counsel to ask 688 that and I want to ask it so we will save time. If

you do have, why, we don't care about going into your background.

A. No.

* * *

709 HELEN HEIMANN

* * *

Q. Mrs. Heimann, do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. No.

* * *

710 Q. Now, if you're one of the twelve jurors and you have heard all of the testimony that has been developed on the witness stand, his Honor has instructed you and you retire to the jury room, and it should be your opinion, along with the other eleven jurors, that this defendant Witherspoon is guilty of the murder of Officer Stone and, further, that the death in the chair is a proper penalty in this case, based on the evidence as you have heard it and the rule of law as given by his Honor, will you say so by signing a guilty verdict?

A. I will.

* * *

713 JULIA DARCY

* * *

714 Q. Do you have a conscientious or religious scruple
715 against the infliction of the death penalty in a proper case?

A. I have a religious scruple.

Mr. Kissane: Cause, Judge.

The Court: Q. In other words, did I understand you to say that you wouldn't vote for the death penalty in any case regardless of the evidence?

A. Yes, sir.

Q. We haven't heard the evidence here yet. We don't know what it will be but it will be developed from the witness stand. But I understand that your position is that you have a religious scruple against the infliction of the death penalty in any case?

A. Yes, sir.

The Court: Challenge for cause is granted. Step aside.

(Prospective juror excused.)

* * *

715 ERNA FORMANEK

* * *

716 Q. (Continuing)—do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. No, I haven't.

* * *

719 Q. Now, if your're selected as one of the twelve jurors, and after you have heard all the witnesses testify on the witness stand, his Honor has instructed you as to the rules of law and you retire to the jury room,
720 it should be your opinion, along with the other eleven, that the defendant Witherspoon is guilty of the murder of Officer Stone and that the proper verdict in this case should be death in the chair, based on the evidence as you have heard it here and the rules of law as given by His Honor, would you so say by signing a guilty verdict?

A. Yes, I would.

Q. And would you so say by fixing death in the chair as being the proper penalty, based upon the law and the evidence in this case?

A. Yes, I would.

• • •

720 BLANCHE CARLSON

• • •

723 Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. No.

• • •

Q. If you're selected as one of the twelve jurors and it should be your opinion, along with the other
723-A jurors, after you heard all the testimony on the witness stand and the rules of law given by his Honor and you're back in the jury room deliberating on the verdict and you find that the defendant Witherspoon is guilty of killing Officer Mitchell Stone and that the proper verdict in this case, based on the law and the evidence, is death in the chair, would you so say by signing a guilty verdict?

A. Yes, I would.

723-A MARY SCOLARO

• • •

Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. Yes, I do.

724 Mr. Kissane: Cause, Judge.

The Court: All right, stand aside.

(Prospective juror excused.)

• • •

724 CECELIA LOHMEIER

* * *

725 Q. Do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. No, sir.

* * *

728 Q. Now, if you're selected as one of the twelve jurors, after having heard all the evidence and the rules of law as given by his Honor, and you're back in the jury room, and it should be your opinion, along with the other eleven, that the defendant Witherspoon is guilty of the murder of Officer Stone, and the proper penalty, under the law and the facts in this case, is that of death in the chair, would you so say by signing a guilty verdict and fixing death in the chair as the penalty?

A. Yes.

* * *

729 BEATRICE DUNCAN

* * *

Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. I do.

Mr. Kissane: Cause.

The Court: Stand aside.

(Prospective juror excused.)

* * *

730 JOHN BOORTZ

• • •

Q. Did any of the questions asked of any of the preceding jurors bring anything to your mind that indicated to you you cannot be a fair and impartial juror?

A. Well, I don't believe in the death penalty.

Q. Do you have a conscientious or religious scruple against the infliction of the death penalty?

A. I have.

Mr. Kissane: Cause, Judge.

The Court: Step aside.

(Prospective juror excused.)

• • •

734 VITO MATTHEW CALAMIA

• • •

Q. Do you have a conscientious scruple against the infliction of the death penalty in a proper case?

A. No, I don't.

Q. Do you have a religious scruple against the infliction of a death penalty in a proper case?

A. No, I haven't.

• • •

738 Q. If you should be one of the twelve jurors and you're back in the jury room and it should be your opinion, along with the other jurors, that Witherspoon is guilty of the charge of the murder of Officer Stone and that death in the chair was a proper verdict, would you so say by signing a guilty verdict and fixing the penalty at death in the chair?

A. Yes, I will.

• • •

LLOYD BOHL

* * *

739 Q. Do you have a conscientious scruple against the infliction of the death penalty in a proper case?

A. Yes, I do.

Mr. Kissane: Cause, your Honor.

The Court: All right. Call another juror.

(Prospective juror excused.)

* * *

742 The Court: . . . We want to get fair jurors for both sides.

The charge of murder is probably the simplest charge on the statute book. It's the unlawful killing of another human, so there is nothing complicated about it, and I think we should show some speed now and finish picking this jury. Since the State is qualifying for the death penalty, I ask you ladies and gentlemen of the jury in the box, do any one of you sitting there now have a religious or conscientious scruple against the infliction of the death penalty? So indicate. All right. This is just to save time.

Mr. Cronin: For cause, your Honor. I think their
743 names should be listed as they come out of the box.

The Court: Yes. Step out and give your name.

Prospective Juror Ahlert: John Ahlert.

Prospective Juror Andrews: Dorothy Andrews.

Prospective Juror Barmann: Edward Barmann.

Prospective Juror Alisauskas: Carmella Alisauskas.

Prospective Juror Hart: Austin Hart.

The Court: All right, call other jurors.

* * *

The Court: 245, step forward, please.

Do you have any conscientious or religious scruples against the infliction of the death penalty?

Prospective Juror 245: Yes, sir.

744 The Court: All right, you will be excused for cause. What's your name?

Prospective Juror 245: James Wilson.

The Court: Just stand on the side.

(Prospective juror excused.)

* * *

The Court: Call another juror.

The Clerk: 242.

The Court: Do you have any conscientious or religious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 242: Yes, I do.

The Court: You do? You may be excused for cause.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 213.

The Court: Let me ask you: Do you have any conscientious or religious scruples against the infliction of the death penalty in a proper case?

745 Prospective Juror 213: Yes, I do.

The Court: You do? You're sure of that or do you just want to get off the jury?

Prospective Juror 213: No.

The Court: You're honest about it?

Prospective Juror 213: Yes, sir.

The Court: All right, step aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 204.

The Court: Let me ask you: Do you have any conscientious or religious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 204: No, sir.

The Court: Take the box.

The Clerk: 197.

The Court: Let me ask you:—

I'm doing this just to save time. This is really the lawyers' work but I'm trying to speed this matter up.

(Continuing) Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 197: No, your Honor.

746 The Court: Take the box.

Call another juror.

The Clerk: 196.

The Court: Let me ask you: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 196: No, I don't.

The Court: Take the box.

Call another juror.

The Clerk: 191.

The Court: Let me ask you: Do you have any conscientious or religious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 191: No, sir.

The Court: Take the box.

Call another juror.

The Clerk: 186.

The Court: Let me ask you: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 186: No, sir.

The Court: Take the box.

All right, counsel, you may proceed.

747 VICTORIA BLAHA

* * *

751 Q. If you're selected as one of the twelve jurors and you have heard all the evidence and the instructions of his Honor and you're back in the jury room and it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of murder and that the proper verdict in this case is that of death in the chair, would you so say by signing a guilty verdict?

A. I would.

* * *

752 The Court: Now, this lady just taking the box: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 243: Yes, I do.

The Court: You do. All right, you may step aside.

(Prospective juror excused.)

The Clerk: 178.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 178: No.

The Court: Take the box.

* * *

WILLIAM BEUKE

* * *

756 Q. Now, the penalties in this State, where the charge is murder, is that of death in the chair, life or any number of years from 14 upwards, such as, 199 or any number of combinations of years the juror feels proper under the law and the evidence in any
757 particular case. Do you understand that?

A. Yes, I do.

Q. Now, where the charge is murder, the jurors, in addition to determining guilt and innocence, in determining the guilt of the defendant, have the additional duty of fixing a penalty they deem proper under the law and the evidence of the case. Do you understand that, sir?

A. Yes, sir.

Q. Now, is there anything about the fact that you have to determine guilt or innocence and also fix a penalty that you'd regard as an undue hardship or burden? Would you find it an unusual hard or difficult burden to assume the fact that you'd have to determine the guilt or innocence and fix a penalty upon the determination of guilt?

A. No.

Q. Now, if you're selected as one of the twelve jurors and it should be your opinion, along with the other eleven jurors, after having heard all the evidence and the rules of law given by His Honor and you're back in the jury room, it should be your opinion, along with the other eleven, that the defendant is guilty,
758 and the next part of your deliberation is to fix a penalty, and when you're at the penalty part of the deliberations it should be your opinion, along with the other eleven jurors, that the proper verdict in this

case is that of death in the chair, based on the evidence as you have heard it here and the rules of law given by his Honor, would you so say by signing a guilty verdict?

A. Yes.

* * *

764 KENNETH STUEBE

* * *

768 Q. Now, do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. No.

The Court: I believe that all the eight jurors in the box have already answered that question.

* * *

770 Q. Now, if it should be your opinion, along with the other eleven jurors, and you have heard all the evidence from the witness stand, the rule of law by his Honor, and you're back in the jury room and it should be your opinion, based on the evidence as you have heard it, the rules of law as given by His Honor that the defendant Witherspoon is guilty of murder and the proper penalty in this case is that of death in the chair, would you say so by signing a guilty verdict and fixing the penalty at death in the chair?

A. Yes.

* * *

772 ERNEST SPARROW

* * *

776 Q. Mr. Sparrow, if you're one of the twelve jurors and it should be your opinion, based on the evidence
777 as you have heard it here and the rules of law as given by his Honor, that the defendant is guilty of the

murder of Officer Stone, based on the evidence here and the law as given by His Honor, it should be your feeling, along with the other eleven jurors, that the proper penalty in this case is death in the chair, would you so say by signing a guilty verdict?

A. Yes, sir.

* * *

JOHN BIESIADA

* * *

783 Q. Now, if it should be your opinion, along with the other eleven jurors, that death in the chair is a proper verdict in this case, would you so say by signing a guilty verdict?

A. Yes, sir.

* * *

783 HERBERT KRUMWIEDE

* * *

787 Q. And if it should be your opinion, at that phase of the jury deliberations, that death in the chair was a proper verdict in this case, based on the evidence that you have heard here and the rules of law as given by his Honor Judge Salter, would you so say by signing a guilty verdict and fixing the penalty at death in the chair?

A. Yes, sir.

* * *

788 The Court: Call another juror.

The Clerk: 159.

The Court: Do you have any religious or conscientious scruples against the inflicting of the death penalty in a proper case?

Prospective Juror 159: Yes, I do.

The Court: All right, you may step aside. Challenge for cause.

Call another juror.

The Clerk: 151.

The Court: This last gentleman called into the box. Do you have any religious or conscientious scruples against the inflicting of the death penalty in a proper case?

Prospective Juror 151: No.

The Court: All right, take the box.

* * *

789 HAZEL SEDIVY

* * *

795 Q. If, based on the evidence as you heard it here on the witness stand and the rules of law given by his Honor Judge Salter, it should be your opinion that the defendant is guilty of murder and that the proper verdict here is death in the chair, would you so say by signing a guilty verdict?

A. Yes, sir.

* * *

798 The Court: . . . This last juror that is taking the box. Let me ask you this question: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 141: None, your Honor.

The Court: You may sit down.

* * *

806 The Court: Call some other jurors.

The Clerk: 140.

The Court: Now, this lady who just entered the box. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 140: I have.

The Court: You do. All right. You may stand aside. A challenge for cause.

807 (Prospective juror excused.)

The Clerk: 137.

The Court: 137, come forward, please.

Let me ask you: Do you have any religious or conscientious scruples against the infliction of the death penalty?

Prospective Juror 137: Yes, sir, I do.

The Court: You say you do. Very well, for cause.

(Prospective juror excused.)

The Clerk: 133.

The Court: Let me ask you: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 133: No, I don't, your Honor.

The Court: Take the box.

Call another juror.

The Clerk: 131.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 131: I do.

The Court: You say you do?

Prospective Juror 131: Yes, sir.

The Court: Very well, you may step aside.

808 (Prospective juror excused.)

The Court: Call another juror.

The Clerk: 130.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 130: No, I don't.
The Court: You may take the box.

* * *

814 ALMA RUFF

* * *

817 Q. Now, if it should be your opinion, along with the other eleven jurors, and you're at that phase of your deliberations with reference to fixing the penalty
818 you deem proper in this case,— it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon should be given death in the chair, would you so say by signing a guilty verdict?
A. I would.

* * *

818 PATRICIA SCHRICKER

* * *

823 Q. Now, if it should be your opinion, along with
823A the other eleven jurors, upon having arrived at your deliberations, that the defendant is guilty and that death in the chair was a proper verdict in this case, would you so say by signing a guilty verdict and fixing the penalty at death in the chair?
A. Yes, sir.

* * *

The Court: All right, call another juror.
The Clerk: 129.

* * *

The Court: Let me ask you: Do you have any religious or conscientious scruples against the death penalty in a proper case?
Prospective Juror 129: Yes, sir, I do.
The Court: All right, stand aside.

Call another juror.

The Clerk: 118.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 118: I do, sir.

824 The Court: You do?

Prospective Juror 118: Yes, sir.

The Court: You may stand aside.

(Prospective juror excused.)

The Clerk: 114.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 114: Yes, I do.

The Court: You're sure of that? You're just not trying to get out of service on this jury?

Prospective Juror 114: No, sir.

The Court: All right, call another juror.

(Prospective juror excused.)

The Clerk: 109.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 109: No, sir.

The Court: You may take the box.

* * *

RICHARD OESTERLIN

* * *

828 Q. And, having arrived at that point in your deliberations, if it should be your opinion, along with the other 11 jurors, that this is properly a case for the fixing of the death penalty, would you so say by

829 signing a guilty verdict and signing a death verdict in the chair?

A. I would.

• • •

830 The Court: Call another juror.

The Clerk: 66.

The Court: Let me ask you this question: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

Prospective Juror 66: I do.

The Court: You do?

Prospective Juror 66: Yes, sir.

The Court: All right, you may stand aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 36.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty

831 in a proper case?

Prospective Juror 36: No, I don't.

The Court: You may take the box.

• • •

831 ROSE MASCIA

• • •

841 Q. Now, at that point in your deliberations, if it should be your opinion, along with the other eleven jurors, that the proper verdict in this case is that of death in the chair for Witherspoon, would you so say by signing that type of a verdict?

A. Yes, sir.

• • •

The Court: Call another juror.

The Clerk: 33.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 33: Yes, I do.

The Court: All right, you may stand aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 14.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 14: Yes, sir, I do.

842 The Court: You say you do?

Prospective Juror 14: Yes, sir.

The Court: How long have you held such an opinion?

Prospective Juror 14: Since I have been going to school.

The Court: You don't believe in the infliction of the death penalty?

Prospective Juror 14: No, sir.

The Court: All right, stand aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: No. 9.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 9: Yes, sir.

The Court: You do? Stand aside.

(Prospective juror excused.)

* * *

845 The Court: . . . I think that I should also state that, in this case, the State is qualifying the jury on the death penalty and that if any of you have a religious or conscientious scruple against the infliction
846 of the death penalty in a proper case you should volunteer that information.

You may call twelve jurors into the box.

* * *

847 The Court: You may call another juror in the box.

The Clerk: 241, please step into the jury box.

The Court: Let me ask you: Do you have any
848 religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 241: Yes, sir.

The Court: You say you do?

Prospective Juror 241: Yes, sir.

The Court: How long have you entertained such views?

Prospective Juror 241. I don't believe in it, sir.

The Court: You just don't believe in it?

Prospective Juror 241: That's right.

The Court: Very well. You'll be excused in the case.

(Prospective juror excused.)

The Clerk: Juror 233.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Juror 233: No, I don't believe so.

The Court: Very well. Take the box.

* * *

849 The Court: And we have called the juror into the box and he has announced he has no scruples against the death penalty, so you may proceed.

* * *

850 ALETHA KREIS

* * *

856 Q. And, having arrived at that point in your deliberations, should it be your opinion, along with the other jurors, under the law and the evidence in this case, that this is the proper case for Witherspoon to be given the death chair, would you say so by signing a guilty verdict?

A. Yes, sir.

* * *

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 226: I think my conscience would bother me.

857 The Court: You don't believe in the death penalty?

Prospective Juror 226: No, I don't.

The Court: Even though it is the law of the State?

Prospective Juror 226: That's right.

The Court: You may stand aside.

(Prospective juror excused.)

The Clerk: 223.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 223: Yes.

The Court: You do? You may step aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 212.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 212: No, sir, I don't.

• • •

858 ETTA BURDA

• • •

864 Q. If it should be your opinion, along with the other eleven jurors, based on the evidence in this case and the rules of law as given by the court, that the defendant is guilty as charged and that death in the chair is a proper verdict in this case, would you so say by signing a guilty verdict?

A. Yes, sir.

• • •

867 The Court: All right, call another juror.

The Clerk: 187.

868 The Court: Do you have any religious or conscientious scruples against the inflicting of the death penalty in a proper case?

Prospective Juror 187: Yes, sir, I have.

The Court: You have entertained that view for some time?

Prospective Juror 187: As long as I could, yes, sir.

The Court: You don't believe in the death penalty?

Prospective Juror 187: No, sir.

The Court: All right, step aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 169.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 169: Well, I certainly do.

The Court: All right, step aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 166.

The Court: It's not the Judge's province to ask these questions. I'm just doing it to help speed
868 things up.

Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 166: No, sir.

The Court: You make take the jury box.

* * *

877 The Court: Call another juror.

The Clerk: 161.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 161: Yes, I do.

The Court: You do. All right, stand aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 160.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 160: I do.

The Court: You do. All right, stand aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 156.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penal-
878 ty in a proper case?

Prospective Juror 156: No, I don't.

The Court: Take the box.

• • •

882 JOHN TOLAN

• • •

886 Q. And if it should be your opinion and your fellow jurors that death in the chair was a proper
887 verdict in this case,—

Mr. Cernek: I object.

Mr. Kissane: Q. (Continuing)—would you sign that type of a verdict?

A. Yes, I would.

• • •

889 The Court: Do you have any religious or conscientious scruple against the infliction of the death penalty in a proper case?

Prospective Juror 162: No, I don't, your Honor.

The Court: Take the box.

FRED RACINE

• • •

892 Q. If it should be your opinion that death in the chair is a proper verdict in this case, would you say so by signing that type of verdict?

A. I would.

• • •

The Court: Call another juror.

The Clerk: 143.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 143: Yes, I do.

The Court: All right, step aside.

(Prospective juror excused.)

893 The Court: Call another juror.

The Clerk: 119.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 119: Yes, sir.

The Court: You do?

Prospective Juror 119: Yes.

The Court: Very well. Step aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 106.

The Court: Those of you in the back rows, come forward here, come up a little closer, (indicating) please. Let's get a little chummier.

Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 106: No, sir.

The Court: All right, take the box.

* * *

899 The Court: Let's call another juror.

The Clerk: 105.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

The Court: Call another juror.

The Clerk: 156.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penal-
878 ty in a proper case?

Prospective Juror 156: No, I don't.

The Court: Take the box.

• • •

882 JOHN TOLAN

• • •

886 Q. And if it should be your opinion and your fellow jurors that death in the chair was a proper
887 verdict in this case,—

Mr. Cernek: I object.

Mr. Kissane: Q. (Continuing)—would you sign that type of a verdict?

A. Yes, I would.

• • •

889 The Court: Do you have any religious or conscientious scruple against the infliction of the death penalty in a proper case?

Prospective Juror 162: No, I don't, your Honor.

The Court: Take the box.

FRED RACINE

• • •

892 Q. If it should be your opinion that death in the chair is a proper verdict in this case, would you say so by signing that type of verdict?

A. I would.

• • •

The Court: Call another juror.

The Clerk: 143.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 143: Yes, I do.

The Court: All right, step aside.

(Prospective juror excused.)

893 The Court: Call another juror.

The Clerk: 119.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 119: Yes, sir.

The Court: You do?

Prospective Juror 119: Yes.

The Court: Very well. Step aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 106.

The Court: Those of you in the back rows, come forward here, come up a little closer, (indicating) please. Let's get a little chummier.

Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 106: No, sir.

The Court: All right, take the box.

* * *

899 The Court: Let's call another juror.

The Clerk: 105.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 105: No, I haven't.

The Court: Take the box.

• • •

900 PAUL G. ONGENA

• • •

902 Q. And if it should be your opinion, along with the other eleven jurors, at this point in your de-
903 liberations that death in the chair is a proper verdict, would you so say by signing that type of verdict?

A. Yes, sir.

• • •

904 The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 104: No, I don't.

The Court: You may take the box.

• • •

910 ALBERT J. KLEIN

• • •

911 Q. If your're one of the twelve jurors and you have heard all the evidence and it's your opinion, along with the other eleven, that the defendant Witherspoon murdered Officer Stone and that the proper verdict is that of death in the chair, would you so say by signing a guilty verdict and fixing that type penalty?

A. Yes.

• • •

913 FRANK MORRISON

* * *

916 Q. And if the penalty that you and your fellow jurors deemed proper was death in the chair, would you so say by signing that type of a verdict?

A. Yes, sir.

916 NANCY KENNEY

* * *

920 Q. Now, if it should be your opinion, along with the other eleven, based on the evidence here as you have heard it and the rules of law as given by the judge, that the defendant Witherspoon should be found guilty of murder and that the proper penalty is that of death in the chair, would you so say by signing the guilty verdict of that type?

A. Yes, sir, I would.

* * *

924 The Court: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

Prospective Juror 98: No.

The Court: Take the box.

* * *

929 The Court: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

Prospective Juror 97: Yes, I do.

The Court: You do?

Prospective Juror 97: Yes, I do.

The Court: You don't believe in the death penalty?

Prospective Juror 97: No. It's just I wouldn't want to be responsible.

The Court: That isn't it. No. Maybe you don't like to be a juror at all, but, then, that's your duty as a citizen. Now, answer my question: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

Prospective Juror 97: No, I haven't.

The Court: All right, take a seat.

• • •

932 The Court: I just don't believe you like to be a juror.

The Prospective Juror [97]: Well, that isn't the idea. I just don't feel I'd like to be responsible for putting—

The Court: None of us do.

The Prospective Juror [97]: (Continuing)—deciding somebody should be put to death. I don't feel like it's my responsibility. I mean, my conscience.

The Court: Step aside, step aside.

(Prospective juror excused.)

The Clerk: 95.

The Court: And do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

933 Prospective Juror 95: No, sir.

The Court: Take a seat.

SYLVIA HYBIAK

• • •

936 Q. And if it should be your opinion, along with the other eleven jurors, that the proper verdict in this case is death in the chair, would so say by signing that type of a verdict?

937 A. Yes, sir.

* * * *

The Court: Call another juror.

The Clerk: No. 91.

The Court: Do you have any religious or conscientious scruples against the imposition of the death penalty in a proper case?

Prospective Juror 91: No, sir.

The Court: Take a seat.

RICHARD HOLZHAUSSER

* * *

941 Q. And, having arrived at that point in your deliberations, do you understand that you have the additional duty of fixing the penalty that you and your fellow jurors deemed proper under the law and the evidence in this case? Do you understand that, sir?

A. Yes, sir.

Q. And that the penalties you're required to consider are death in chair life or any number of years more than fourteen? Do you understand that?

A. Yes, sir.

Q. Now, if it should be your opinion, along with the other eleven jurors, that the defendant is guilty as charged in the indictment of the murder of Officer Stone and that death in the chair is the proper penalty under the law and the evidence in this case, would you so say by signing a guilty verdict?

A. Yes, sir.

* * *

944 The Court: To save time, I want to ask you this question:—It's really the lawyer's duty but, then, I'm pinch hitting for both sides here—Do you have any

religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 86: Yes, I do.

The Court: It doesn't make any difference what the evidence is, you'd never vote for the death penalty?

Prospective Juror 86: No.

The Court: All right, you may be excused.

945 (Prospective juror excused.)

The Clerk: 84.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty?

Prospective Juror: No, sir.

The Court: Take the box.

Call another juror.

The Clerk: 77.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 77: No, sir.

The Court: Take the box.

Call another juror.

The Clerk: 76.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 76: No, your Honor.

The Court: Take the box.

Call another juror.

The Clerk: 75.

The Court: Do you have any religious or conscientious scruples against the infliction of the death pen-

946 alty in a proper case?

Prospective Juror 75: No, sir.

The Court: Take the box.

All right, counsel, you may proceed.

• • • •

966 The Court: Call another juror.

The Clerk: 72.

The Court: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

Prospective Juror 72: No, sir.

The Court: Take the box.

• • • •

969 The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 71: No, sir.

The Court: Take the box.

• • •

973 JOHN HAYES

• • • •

976 Q. Now, should it be your opinion, along with the other eleven jurors, based on the evidence as you have heard it and the rule of law as given by His Honor, that death in the chair is a proper verdict in this case, based on the law and the evidence as you have heard it here, would you so say by signing a verdict fixing the penalty at death in the chair?

A. Yes, sir.

Q. If you had any reservations in your mind, you'd tell us at this time, is that correct?

A. Yes, sir.

• • •

977 HERBERT GROSS, JR.

• • •

982 Q. Now, if it should be your opinion, along with the other eleven jurors, based on the evidence as you have heard it here and the rules of law as given by his Honor, that death in the chair is a proper verdict, under the law and the evidence in this case, would you so say by signing a guilty verdict and fixing death in the chair as the penalty?

A. Yes.

• • •

987 CARL GEHRKE

• • •

989 Q. If it should be your opinion, along with the other eleven, having arrived at that point in your deliberations, that death in the chair was a proper verdict, under the law and the evidence in this case, would you so say by signing that type of a verdict?

A. Yes.

• • •

The Court: Call another juror.

The Clerk: No. 70.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 70: Yes, I have, your Honor.

The Court: How do you entertain such scruples?

Prospective Juror 70: Well, I have been a Catholic all my life and I don't believe in the death penalty, that's all.

The Court: It isn't against your religion, is it?

Prospective Juror 70: No, it isn't.

The Court: Then it's a personal opinion?

Prospective Juror 70: Yes, sir.

The Court: As I understand you, it's not just
991 getting off of service?

Prospective Juror 70: No, sir.

The Court: You disbelieve it, regardless of what the evidence is? We don't know what the evidence is in this case, but it's a murder charge and we don't know, from the evidence, whether the death penalty warrants it. The State is qualifying, as you heard, for the death penalty. But your position is that you wouldn't vote for the death penalty in any case?

Prospective Juror 70: No, sir.

The Court: You may stand aside.

(Prospective juror excused.)

The Clerk: 68.

The Court: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

Prospective Juror 68: No, sir.

The Court: You may take the box.

MARIE FLANAGAN

* * *

998 Q. Now, if it should be your opinion, along with the other eleven jurors, having arrived at that point in your deliberations, that the defendant is guilty of murder and that the proper penalty in this case, based on the evidence as you have heard it and the rule of law as given by his Honor, that death in the chair is a proper verdict, would you so say by signing that verdict?

A. Yes, sir.

* * *

999 The Court: Call another juror.

The Clerk: 67.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty?

Prospective Juror 67: No, your Honor.

The Court: All right, take the box.

HARRY FISET

* * *

1005 Q. Now, should it be your opinion, along with the other eleven jurors on this case, based on the evidence as you heard it and the rule of law given by his Honor, that the defendant Witherspoon should be sentenced to death in the chair, would you so say by signing that type of verdict?

A. Yes, sir.

* * *

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 63: Yes, sir.

1006 The Court: All right, you may step aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 47.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Prospective Juror 47: No, sir, I do not.

The Court: All right, take the stand.

* * *

1011 WAT T. CLUVERIUS

• • •

1016 Q. Now, at that phase of the deliberations as a juror, if it should be your opinion, along with the other eleven jurors, that this is a proper case for fixing the penalty at death in the chair for the defendant Witherspoon, for the murder of Officer Stone, would you so say by signing a guilty verdict and fixing death in the chair as the penalty?

A. Yes, I would.

• • •

1017 The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty?

Prospective Juror 46: I do.

The Court: Stand aside.

1018 (Prospective juror excused.)

The Court: Call another juror.

The Clerk: 40.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty?

Prospective Juror: Yes, I do.

The Court: Stand aside.

(Prospective juror excused.)

The Court: Call another juror.

The Clerk: 39.

The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty?

Prospective Juror 39: No, sir.

The Court: Take the box.

• • •

1020 NED CALDERONE

• • •

1025 Q. Now, at that phase of your deliberations as a juror, if it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of the murder of Officer Mitchell Stone and the proper penalty here is that of death in the chair, would you sign that type of a verdict?

A. Yes, sir.

• • •

APPENDIX 2

STATUTORY PROVISIONS REGARDING CHALLENGES FOR CAUSE BY REASON OF VIEWS CONCERNING THE DEATH PENALTY.

Statutes Not Requiring Connection Between Views and Verdict.

ALABAMA

Additional ground of challenge in certain cases in favor of state.—On the trial for any offense which may be punished capitally, or by imprisonment in the penitentiary, it is a good cause of challenge by the state that the person has a fixed opinion against capital or penitentiary punishments, or thinks that a conviction should not be had on circumstantial evidence; which cause of challenge may be proved by the oath of the person, or by other evidence.

Ala. Code, Title 30, §57 (1959).

GEORGIA

Questions on voir dire on trial for felony.—On trials for felonies any juror may be put upon his voir dire and the following questions shall be propounded to him, *viz*:

* * *

3. "Is your mind perfectly impartial between the State and the accused?" If the juror shall answer this question in the affirmative, he shall be adjudged and held a competent juror in all cases where the offense does not involve the life of the accused; but when it does involve the life of the accused, the following additional question shall be put to him:

4. "Are you conscientiously opposed to capital punishment?" If he shall answer this question in the negative,

he shall be held a competent juror: Provided, nevertheless, that either the State or the defendant shall have the right to introduce evidence before the judge to show that the answers, or any of them, are untrue; and it shall be the duty of the judge to determine upon the truth of such answers as may be thus questioned before the court.

Ga. Code Ann., §59-806 (1965).

LOUISIANA

Causes for challenge by the state

It is good cause for challenge on the part of the state, but not on the part of the defendant, that:

* * * *

(2) The juror tendered in a capital case has conscientious scruples against the infliction of capital punishment;

* * * *

La. Code Crim. P., Art. 798 (1966).

TEXAS

* * *

(b) A challenge for cause may be made by the State for any of the following reasons:

1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;

* * * *

Tex. Code Crim. P. Ann., Art. 35.16 (1966).

See also Kansas Gen. Stat. Ann., § 62-1405 (1964), Montana Rev. Codes Ann., § 95-1909(d)(2) (ix) (1967), and Utah Code Ann. § 77-30-19 (12) (1953), set out below.

Statutes Requiring Connection Between Views and Verdict on Penalty Issue.

INDIANA

Challenges for causes.—The following shall be good causes for challenge to any person called as a juror in any criminal trial:

* * *

Third. If the offense charged be punishable with death, that he entertains such conscientious opinions as would preclude his affixing the death penalty if the defendant should be found guilty.

* * *

Ind. Ann. Stat. § 9-1504 (1956).

Statutes Requiring Connection Between Views and Verdict On Innocence-Guilt Issue.

DELAWARE

Examination upon voir dire in capital cases

When a juror is called in a capital case, he shall be first sworn or affirmed upon the voir dire and then asked, under the direction of the Court, if he has formed or expressed any opinion in regard to the guilt or innocence of the prisoner at the bar. If his answer is in the negative, he shall be sworn as a juror in the case, unless he has conscientious scruples against finding a verdict of guilty in a case where the punishment is death, even if the evidence should so warrant him. . . .

Del. Code Ann., Title 11, §3301 (1953).

MINNESOTA

Causes of challenge for implied bias.

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

• • •

(8) If the offense charged is punishable by death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror.

Minn. Stat. Ann., §631.31 (1947).

MONTANA

A challenge for cause may be taken for all or any of the following reasons; or for any other reason which the court determines:

• • •

(viii) If the offense charged be punishable with death, with entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

(ix) Having a belief that the punishment fixed by law is too severe for the offense charged.

Mont. Rev. Codes Ann. §95-1909 (d) (2). (1967).

NORTH DAKOTA

Matters constituting implied bias specified.—A challenge for implied bias of a juror may be taken for all or any of the following causes, and for no other:

• • •

8. If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror;

• • •

N. D. Cent. Code Ann., § 29-17-36 (1960).

OHIO

Causes of challenging of jurors.

• • •

(C) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death;

• • •

Ohio Rev. Code Ann. §2945.25 (1954).

SOUTH DAKOTA

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

• • •

(10) If the offense charged be punishable with death the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror.

S. D. Code, § 34.3618 (Supp. 1960).

UTAH

For implied bias—Grounds.—A challenge for implied bias may be taken for all or any of the following causes, and for no other:

• • •

(9) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

• • •

(12) Having a belief that the punishment fixed by law is too severe for the offense charged.

Utah Code Ann. §77-30-19 (1953).

WYOMING

Causes for challenge enumerated.—The following shall be good cause for challenge to any person called as a juror on any indictment:

• • •

Third—In indictments for an offense, the punishment whereof is capital, that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death.

• • •

Wyo. Stat. Ann. §7-224 (1957).

Statutes Requiring Connection Between Views and Verdict on Innocence-Guilt Issue, But Which Have Been Construed to Require Connection Between Views and Verdict On Penalty Issue.

ARIZONA

Grounds for individual challenges

A. Any party may challenge an individual juror upon the ground that the juror

• • •

14. If the offense charged is punishable by death entertains conscientious opinions which would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror.

Ariz. R. Crim. P. 219 (1956);
State v. *Narten*, 99 Ariz. 116, 123, 407 P.2d 81, 86 (1949), cert. denied 384 U.S. 1008.

ARKANSAS

Implied bias.—A challenge for implied bias may be taken:

* * *

Seventh. When the offense is punishable with death, the entertaining of such conscientious opinions as would preclude him from finding the defendant guilty.

Ark. Code Ann. § 43-1920 (1964);
Needham v. *State*, 215 Ark. 935, 938-39, 224 S.W.2d 785, 787 (1949).

CALIFORNIA

Causes for challenge for implied bias.

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

* * *

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

Cal. Penal Code Ann. §1074 (1956);
People v. *Riser*, 47 Cal. 2d 566, 573-76, 305 P.2d 1, 5-7 (1956), appeal dismissed 358 U.S. 646.

FLORIDA

No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be allowed to serve as a juror on the trial of any capital case.

Florida Stat. Ann. §932.20 (1944);
Piccott v. *State,* 116 So. 2d 626, 627-28 (1959), cert. denied 364 U.S. 293.

IDAHO

Identical to California.

Idaho Code, § 19-2020(9) (1948);
State v. *Owen,* 73 Idaho 394, 400-01, 253 P. 2d 203, 206 (1953).

KANSAS

62-1404. Jurors where offense punishable with death. If the offense charged be punishable with death, any person entertaining such conscientious opinions as would preclude his finding the defendant guilty shall not serve as a juror.

62-1405. Persons with certain scruples or opinions not to be sworn as jurors. No person who believes the punishment fixed by the law to be too severe for the offense or entertains any opinion that would preclude his finding the defendant guilty, shall be sworn as a juror.

Kan. Gen. Stat. Ann. §62-1404, 1405 (1964);
State v. *Latham,* 190 Kan. 411, 431-32, 375 P.2d 788, 803-04 (1962) cert. denied 373 U.S. 919.

MASSACHUSETTS

Opinions Disqualifying Juror in Capital Case.

A person whose opinions are such as to preclude him from finding a defendant guilty of a crime punishable with death shall not serve as a juror on the trial of an indictment for such crime.

Mass. Gen. Laws Ann., Ch. 278, § 3 (1956);
Commonwealth v. *Ladetto,* 349 Mass. 237, 246, 207 N.E. 2d 536, 542 (1965).

MISSOURI

Death penalty—persons opposed to, may serve as jurors, when

Persons whose opinions are such as to preclude them from finding any defendant guilty of an offense punishable with death, shall be ineligible to serve as jurors on the trial of an indictment or information charging any such offense, unless such disqualification is waived by the representative of the state when selecting the jury in any such case.

Mo. Rev. Stat. Ann., §546.130 (1953);
State v. *Pinkston,* 336 Mo. 614, 618-19, 79 S.W.2d 1046, 1049 (1935).

NEBRASKA

Challenges for cause. The following shall be good causes for challenge to any person called as a juror or alternate juror, on the trial of any indictment:

• • • •

(3) in indictments for an offense the punishment whereof is capital, that his opinions are such as to preclude

him from finding the accused guilty of an offense punishable with death;

• • •

Neb. Rev. Stat., §29-2006 (1964);
Rhea v. *State*, 63 Neb. 461, 365-76, 88 N.W. 789, 790-93 (1902).

NEW YORK

Grounds of challenge for implied bias

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

• • •

8. If the crime charged may be punished with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror.

Code Crim. P. §377 (Supp. 1967);
People v. *Fernandez*, 301 N.Y. 302, 320-1, 93 N.E. 2d 859, 868-9 (1950), cert. denied 340 U.S. 914.

OKLAHOMA

Implied bias, challenge for

A challenge for implied bias may be taken for all or any of the following cases, and for no other:

• • •

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty of, in which case he shall neither be permitted nor compelled to serve as a juror.

Okl. Stat. Ann., Title 22, §660 (1937);
Smith v. *State*, 50 Okl. Cr. 282, 114 Pac. 350, 351 (1911).

VIRGINIA

When person opposed to capital punishment disqualified —A person whose opinions are such as to prevent his convicting anyone of an offense punishable with death shall not be allowed to serve as a juror on a trial for such offense.

Va. Code Ann. §19.1-210 (1960);
Hampton v. *Commonwealth,* 190 Va. 531, 548-49, 58 S.E.2d 288, 294-95 (1950), cert. denied 339 U.S. 989.

WASHINGTON

Challenge for cause — Capital case — Conscientious scruples. No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be compelled or allowed to serve as a juror on the trial of any indictment or information for such an offense.

Wash. Rev. Code Ann., §10.49.050 (1961);
State v. *Riley,* 126 Wash. 256, 218 Pac. 238, 239-41 (1923).

APPENDIX 3

EXCERPTS FROM PUBLIC OPINION POLLS ON CAPITAL PUNISHMENT

THE PUBLIC PULSE

By Elmo Roper And Associates

(For release on or after February 9, 1958)

DEATH SENTENCE NOT FAVORED

Despite the fact that our world has become all too familiar with mass slaughter in war, death of a specific individual by legal execution still bothers the conscience of man. Some countries have abolished capital punishment, and some states in our country have done so. While the death sentence still has a good deal of support, the weight of American public opinion is against execution as a punishment for even the most serious crimes. Here is the way a recent nationwide cross section split on this issue:

> Certain states have abolished the death sentence. Do you think people who have been convicted of the worst crimes, like murder, should be executed, or do you think the heaviest penalty given anyone should be life imprisonment?

For death sentence	42%
Against death sentence	50
Express no opinion	8

Opposition to the death penalty is strongest among the lower economic groups. Fifty-three per cent at the lowest economic levels oppose it, while its opponents among the higher economic levels are only 42 per cent. The charge has been made that it is the poor and friendless who most often pay the ultimate penalty. A feeling that the better off have a better chance at justice may underlie the attitudes of the lower income groups. This sense of unequal justice may also influence the thinking of Negroes, 78 per cent of whom are opposed to capital punishment.

GALLUP POLITICAL INDEX

'Report No. 13, 9.16. June, 1966

DEATH PENALTY

Question: "Are you in favor of the death penalty for persons convicted of murder?"

JUNE, 1966

	Yes, in Favor	No	No Opinion
	%	%	%
NATIONAL	42	47	11
Sex			
Men	47	45	8
Women	38	49	13
Race			
White	44	46	10
Non-white	x	x	x
Education			
College	46	46	8
High School	41	48	11
Grade School	42	46	12
Occupation			
Prof. & Bus.	43	48	9
White Collar	57	30	13
Farmers	40	44	16
Manual	40	50	10
Age			
21 - 29 years	40	50	10
30 - 49 years	43	45	12
50 & over	43	47	10

Religion			
Protestant	42	48	10
Catholic	44	45	11
Jewish	x	x	x
Politics			
Republican	51	40	9
Democrat	39	51	10
Independent	41	48	11
Region			
East	45	43	12
Midwest	42	48	10
South	35	53	12
West	50	42	8
Income			
$7,000 & over	45	47	8
$5,000 - $6,999	41	50	9
$3,000 - $4,999	42	40	18
Under $3,000	40	50	10
Community Size			
500,000 & over	43	43	14
50,000 - 499,999	43	49	8
2,500 - 49,999	47	44	9
Under 2,500, Rural	39	51	10

LOUIS HARRIS and ASSOCIATES, INC.
JULY, 1966

THE DEATH PENALTY

On Capital Punishment, the cross-section was asked:

"Some states have abolished capital punishment—executing persons who commit a murder—and have substituted life imprisonment instead. Do you favor or oppose capital punishment?"

Capital Punishment

	Favor %	Oppose %	Not sure %
Nationwide	38	47	15
By education			
8th grade or less	32	52	16
High school	28	46	16
College	44	44	12
By size of place			
Cities	37	46	17
Suburbs	48	37	15
Towns	30	56	14
Rural	33	52	15
By sex			
Men	44	43	13
Women	31	51	18

It is surprising that the less well-educated, more rural and small town resident — women especially — carry the day against capital punishment. The more affluent parts of society, especially among men and suburban dwellers, are more in favor of continuing capital punishment.

APPENDIX 4

EXCERPTS FROM STUDIES OF THE RELATIONSHIP BETWEEN ATTITUDES TOWARD CAPITAL PUNISHMENT AND "PROSECUTION-PRONENESS" ON THE ISSUE OF GUILT OR INNOCENCE

BELIEF IN CAPITAL PUNISHMENT AND JURY PERFORMANCE[1]

W. Cody Wilson

University of Texas

The Problem

Oberer has raised the question, "Does disqualification of jurors for scruples against capital punishment constitute denial of fair trial on issue of guilt?" He reviews the legal precedents and arguments and draws two conclusions: 1) the question has never been squarely presented to any court; and 2) due process is not a static concept so that when the issue is presented the testimony of expert witness from psychology may be relevant.

While the question raised by Oberer is a legal one, a closely related question may be answered by psychological research: Do people who believe in capital punishment differ from those who have scruples against capital punishment in other psychological characteristics relevant to the jury trial process?

A study of 187 junior and senior college students was carried out in the spring of 1964 in order to provide an answer to the general question.

The Study

The general question was differentiated into several more specific questions; do people who believe in capital punish-

ment differ from those with scruples against capital punishment in terms of: a) tendency to say guilty in response to simulated capital cases; b) confidence in decisions of guilt and innocence; c) degree of punishment (excluding death penalty) recommended; d) bias in favor of the prosecution and against the defendant; and e) bias against insanity as a defense plea.

Information was obtained from the students by means of a questionnaire that contained several different parts.

One part of the questionnaire was composed of a series of simulated capital cases; that is, brief written descriptions of the facts presented to the jury in five criminal court cases. The individual was asked to assume that he is a member of the jury before which the case is being tried and, on the basis of the facts and his interpretation and evaluation of them, to reach a decision of guilt or innocence. He was also asked to indicate the degree of confidence that he had in each decision. The cases involved rape and murder, burglary and murder, robbery and murder, rape, and domestic homicide. The number of cases in which the verdict of guilty was reached was used as an index of the tendency to say guilty.

The subjects were also asked the question the answer to which forms the basis of a challenge for cause, "Do you have conscientious scruples against the death penalty, or capital punishment for a crime?" The answers were either yes or no.

The subjects were asked to agree or disagree with a series of statements such as:

a) The district attorney's interpretation of the facts in a criminal case are usually more reliable than the defense lawyer's.

b) If two witnesses gave conflicting testimony in a criminal case, I would probably believe the witness for the prosecution rather than the witness for the defense.

c) If I were a member of a jury, I could never vote "not guilty" for a man whose defense was insanity.

d) The plea of "not guilty by reason of insanity" is a loophole that allows many criminals to escape punishment.

The number of statements, similar to the first two, that the subject agreed with was used as a measure of the tendency to be biased in favor of the prosecution. The number of statements, similar to the latter two, that the subject agreed with was used as a measure of the tendency to be biased against insanity as a defense plea. There were eight statements of the first type and seven of the second type.

Lastly, the subjects were asked to assume that the jury had agreed upon a verdict of guilty in each of the simulated cases. Now he was asked to recommend an appropriate punishment. The allowable punishments ranged from suspended sentence to life imprisonment but did not include the death penalty. Each subject was given a score based on the amount of punishment recommended.

The subjects were divided into two groups based on their answer to the question, "Do you have conscientious scruples against capital punishment?", and the two groups were compared in terms of their responses to the other questions.

The Results

People who have scruples against capital punishment are less likely to say guilty than are people who believe in capital punishment.

Relationship Between Belief in Capital Punishment and Tendency to Say Guilty

# of Cases Guilty		Scruples Against C. P.	Believe in C. P.
	0,1,2	23	7
	3,4	65	50
	5,6	18	24

$X^2 = 8.4$; $P < .02$

People who believe in capital punishment are more confident of their decisions of guilt and innocence than are people who have scruples against capital punishment.

Relation Between Belief in Capital Punishment and Confidence in Decision

Confidence in Decision		Scruples Against C. P.	Believe in C. P.
	Low	22	13
	Medium	70	46
	High	13	22

$X^2 = 7.1$; $P < .05$

That is, people who believe in capital punishment are not only more likely to say guilty, they are also more sure that they are right in their decision.

People who believe in capital punishment are likely to assess a more severe punishment—even without the death penalty—than are people who have scruples against capital punishment.

Relation Between Belief in Capital Punishment and Severity of Punishment

Severity of Punishment	Scruples Against C. P.	Believe in C. P.
Low	22	3
Medium	52	31
High	32	47

$\chi^2 > 15$; $P < .001$

People who believe in capital punishment are more likely to be biased in favor of the prosecution than are people who have scruples against capital punishment.

Relation Between Belief in Capital Punishment and Bias in Favor of Prosecution

# of "Prosecution" Items Accepted	Scruples Against C. P.	Believe in C. P.
0,1	67	41
2-8	39	40

$X^2 > 3.1$; $P < .10$

People who believe in capital punishment are more likely to be biased against insanity as a defense than are people who have scruples against capital punishment.

Relationship Between Belief in Capital Punishment and Bias Against Insanity as Defense

# of Bias Against Insanity Items Accepted	Scruples Against C. P.	Believe in C. P.
0,1,2	69	43
3-7	37	38

$X^2 > 3$; $P < .10$

Similar results were found for a similar group of 61 students in New York City.

Conclusions

If we may assume that the observed relationships between these variables hold among the adult population at large (and it is generally found that relationships among such value and behavior items are stronger among adults in general than among college students), then we may conclude that a jury selected by systematically excluding people who have scruples against capital punishment is biased in the direction of being mere likely to bring a verdict of guilty, being more confident of this decision of guilt, favoring the prosecution in opposition to the defense, being prejudiced against the plea of not guilty by reason of insanity, and assessing a more severe punishment excluding the death penalty.

If the existence of such systematic biases in juries as a result of the selection process constitutes denial of fair trial, then disqualification of jurors for scruples against capital punishment does constitute denial of fair trial.

ATTITUDE TOWARD CAPITAL PUNISHMENT AND BEHAVIOR AS A JUROR IN SIMULATED CAPITAL CASES

Faye J. Goldberg
Morehouse College

METHOD: To determine the relationship between attitudes toward the death penalty and the types of decisions made by jurors in capital cases a questionnaire describing sixteen simulated cases in which the death penalty might be given was administered to 200 male and female college students, 100 Negro and 100 white. The subjects were asked to make a judgment of guilt or innocence in each case with the possibility of judging Not Guilty by Reason of Insanity, Guilty of First Degree Murder, etc.

In cases judged Guilty they were asked to set the penalty which could range from probation to death. In addition they were asked to answer Yes or No to the question, Do you have conscientious scruples against the use of the death penalty.

RESULTS: 1. Subjects who said they did not have conscientious scruples against the death penalty, as compared with those that stated that they did have such scruples, are:

a. More likely to convict
(Subjects who stated they had no scruples against the death penalty found a verdict of guilty in 75% of the cases as opposed to 69% of the cases in the group that professed scruples against the death penalty.)

b. More likely to convict for a more serious crime
(The group with no death penalty scruples found the defendant guilty of first degree murder in 48% of their convictions; the group having scruples against the death penalty returned a verdict of first degree murder in 41% of the cases.)

c. Less likely to judge Not Guilty by reason of insanity
(9% of the cases were so judged by the "no scruples" group; 14% by the "scruples" group)

d. More likely to impose harsher sentences
(73% of the cases judged Guilty by the "no scruples" group received a

sentence of Death or Life Imprisonment; 58% of the cases judged Guilty by the group with scruples against the death penalty received such a sentence.)

2. In answer to the question, Do you have conscientious scruples against the use of the death penalty?, 61% responded affirmatively. There was a marked racial difference: 76% of the Negro subjects said that they held such scruples and 47% of the white subjects. Also, slightly more women than men opposed the death penalty (64%: 59%).
3. There was marked inconsistency between the answers given by the subjects to the direct question on scruples against the death penalty and their administration of death sentences in the simulated cases. Forty-two percent of the subjects who replied affirmatively to the question contradicted themselves by imposing one or more death sentences in the simulated cases. Of these "contradictory" subjects, 90% were Negro.
4. Racial differences disappeared when the subjects were compared on "actual" use of the death penalty in the simulated cases.
5. In comparing only those subjects who were consistently against the death penalty, both in response to the direct question and in the simulated cases, with those who were consistently for the death penalty, the above findings (1, a, b, c) continued to hold but were more sharply emphasized.

SUPREME COURT 11: 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. [redacted]1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS
and JOSEPH WOODS, Sheriff
of Cook County, Illinois,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS

MOTION OF REBECCA B. MADDEN FOR LEAVE TO FILE A BRIEF AMICUS IN SUPPORT OF PETITIONER.

BRIEF IN SUPPORT OF MOTION TO PARTICIPATE AS AMICUS CURIAE.

BRIEF OF REBECCA B. MADDEN AS AMICUS CURIAE IN SUPPORT OF PETITIONER.

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State v. Garrington, 11 S.C. 178, 76 N.W. 326 (1898) 16

State v. Lee, 91 Iowa 449,, 60 N.W. 119 (1894) 16

State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) 24

State v. Reynolds, 43 N. J. 597, 206 A.2d 758 (1965) 16

State v. Wilson, 234 Iowa 60, 11 N.W.2d 737 (1943) 16

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L. Ed. 2d 1199 (1967) 30

Swain v. State of Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed.2d 759 (1965) 23, 26

Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed 2d 453 (1966) 30, 31

Turner v. State of Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965) 20

United States v. Wood, 299 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78 (1936) 27

White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) 24

CONSTITUTIONS, STATUTES AND RULES:

U.S. Const. amend. VI 5, 10, 11, 13, 20, 22

U.S. Const. amend. XIV 5, 10, 11, 13, 20, 22

Arizona Revised Statutes Sec. 13-452 15

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OTHER:

Adorno, Frenkel-Brunswik Levinson & Sanford, *The Authoritarian Personality* (Harper, 1950).... 19

31 Am. Jur. *Jury* 27

Broeder, *The University of Chicago Jury Project,* 38 Neb. L. Rev. 744 (1958) 28

Bye, *Recent History & Present Status of Capital Punishment in the United States,* 17 J. Crim. L. 234 (1962) 14

Crosson, *An Investigation into Certain Personality Variables Among Capital Trial Jurors* (Ph.D. thesis, Western Reserve University, 1966) 13, 19

Jefferson, Inaugural Address, March 4, 1801 20

Kalven and Zeisel, *The American Jury* (Little Brown & Co., 1966) 17, 28

Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. Pa. L. Rev. 1099 (1953) 14, 15, 17

McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania,* 30 Pa. B.A.Q. 252 (1959) 19

National Observer, Aug. 30, 1965, p.5 20

1965 National Prison Statistics (Dept. of Justice), p. 11 22

Oberer, *Does Qualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?,* 39 Texas L. Rev. 545 (1961) 15

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 344

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS
and JOSEPH WOODS, Sheriff
of Cook County, Illinois,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS

MOTION OF REBECCA B. MADDEN FOR LEAVE TO FILE A BRIEF AMICUS IN SUPPORT OF PETITIONER.

Rebecca B. Madden respectfully moves for leave to file a brief amicus in support of the position of petitioner in this cause. Her own case is now pending in the Supreme Court of the State of Arizona. While there are other and additional substantial questions in her case in that court the question of the propriety of a death qualified jury is there clearly presented. Her case will thus probably be controlled by this case. The facts as to her case are a significant factual variation of the instant case which are necessary to a full consideration of the issue now before the Court and, indeed, involve what is probably the most common situation in death qualified juries. There are thus facts or questions of law that cannot adequately be presented by the parties and which are highly relevant to the disposition of the *Witherspoon* case, all

as is more fully set forth in the accompanying brief in support of this motion.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By John P. Frank
John J. Flynn
Paul G. Ulrich

IN THE SUPREME COURT OF THE UNITED STATES

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OF THE STATE OF ILLINOIS

BRIEF IN SUPPORT OF MOTION TO PARTICIPATE AS AMICUS CURIAE

The *Witherspoon* case presents the question whether it is proper to exclude from the jury in a criminal case all persons who have conscientious objections to the death penalty. *Witherspoon* arises in the context of an actual death sentence. But there is an important variant of this situation, the situation in which the death sentence is never seriously sought by the prosecution and the jury is not instructed concerning the death penalty. Here the device of death qualifying the jury serves only to exclude persons of a particular cast of mind from the determination of the defendant's guilt or innocence.

Mrs. Madden's case, now awaiting oral argument in the Supreme Court of Arizona under the number 1745, squarely presents the latter situation. Mrs. Madden was accused of murdering

her husband. There was no doubt but that in fact a gun which she was holding killed him. There was a substantial factual question as to whether the circumstances presented constituted accident or self-defense. The information charged first degree murder. On the strength of the information alone, the State was allowed to death qualify the jury. Eleven potential jurors out of a total panel of fifty-three were eliminated because of their objection to the death penalty. Express objection was made, carefully preserving the federal question, against stacking the jury with "hard headed ultra conservative" people.

There has in fact been only one woman given the death penalty in the history of Arizona, and on the circumstances of the particular case, with all of its doubts, it was inconceivable that this would be the second. The prosecution in fact withdrew the request for a death penalty before the matter went to the jury. The jury returned a verdict of second degree murder.

1. This Court can take judicial notice, from the experience of every Justice who has tried criminal cases, that the device of death qualifying a jury in cases in which in fact there is no real possibility of the death penalty is commonly used. The object can be put in the classical language of Jamesian philosophy, and be treated as a matter of segregating the "tough minded" from the "tender minded." But such classical language is not commonly used by lawyers in the midst of their trade. Here the reference usually is that, "We're going to get the bleeding hearts off the jury and have only the hard nosed left." The court rejected defendant's contention that prospective jurors opposing the death penalty should be subject only to peremptory challenge, stating:

> "I had this come up before. That may eventually be the law, but I am sure it isn't yet. So show that the defense objects to permitting the State to challenge for cause jurors who are opposed to the death penalty under any circumstances. Show that the objection is overruled."

2. Whatever the jargon, there is clearly a constitutional question under the Due Process and Equal Protection clauses of the

Fourteenth Amendment and under the Sixth Amendment as made applicable to the states by the Fourteenth Amendment whether a person's constitutional rights are taken from him when, in addition to its peremptory challenges, the State is given the power to exclude prospective jurors who are likely to bring a particular attitude, or opinion, or cast of mind as to the death penalty to the question of guilt or innocence in a nondeath case. The abuse might be regarded as particularly great in the nondeath cases, for here the only object of the death qualification is to prejudice the determination of guilt or innocence. The death qualification becomes simply a maneuver. Even in a case such as *Witherspoon*, where the jury may actually be called upon to impose the death penalty, we believe the practice of death qualification to be wrong. In the cases in which there is no such question to be decided, there is no possible basis for corrupting the free choice of a fair and impartial jury of one's peers by excluding that large portion of the population which has a particular view concerning the death penalty.

Mrs. Madden requests leave to file a brief amicus in support of the petitioner because the rights of persons in this second group of cases will almost certainly be settled by the Court's decision of *Witherspoon*. She asks to bring to the attention of the Court her point of view relating to the use of death qualified juries in nondeath cases. No other party before the Court has an interest of a similar nature.

3. Mrs. Madden also seeks leave to bring to the attention of the Court the possible existence of cases involving the death qualification issue other than *Witherspoon* in which records have been solidly made, so that such cases may not be prejudiced by an adverse determination of the issue of retroactivity. Because of the widespread comment in recent years concerning the continued utility and desirability of retaining the death penalty, the Court should, in the event that it rules in favor of the petitioner in *Witherspoon*, also apply that ruling to other cases presenting the

same question as to which, at the minimum, the remedy of direct appeal has not yet been exhausted.

CONCLUSION

It is respectfully submitted that Mrs. Madden should be permitted to file a brief amicus in this matter in support of the position of the petitioner in this cause.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By John P. Frank
John J. Flynn
Paul G. Ulrich

March, 1968.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 344

WILLIAM C. WITHERSPOON,

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vs.

PEOPLE OF THE STATE OF ILLINOIS
and JOSEPH WOODS, Sheriff
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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS

BRIEF OF REBECCA B. MADDEN AS AMICUS CURIAE

Opinion

This is a certiorari to the Supreme Court of Illinois, to review a decision reported at 36 Ill. 2d 471, 224 N.E.2d 259. Other opinions concerning petitioner appear at 27 Ill. 2d 483, 190 N.E.2d 281 (1963) (death penalty affirmed), and 337 F.2d 427 (7th Cir. 1964) (determination by district court that petitioner was entitled to be resentenced reversed and habeas corpus petition dismissed). Other, unreported, proceedings are set forth in the opinion of the Supreme Court of Illinois. 224 N.E.2d at 260-61.

Jurisdiction and Statutes Involved

Amicus adopts petitioner's statements of jurisdiction and of

the constitutional provisions, treaties, statutes and ordinances, and regulations which the case involves.

Question Presented

Whether the operation of the Illinois statute providing that the State could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment deprived petitioner of a jury which fairly represented a cross section of the community and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Statement

Amicus adopts the statement of the case contained in the petitioner's brief. There are, however, other factual situations to which the Court's attention is called that should be taken into consideratoin by it in its determination of the death qualification issue in the *Witherspoon* case.

The first such circumstance relates to the type of case in which there is no substantial possibility that the jury will return a death penalty but in which, nevertheless, the death penalty is sought as a means of obtaining a jury that will be more likely to return a guilty verdict. The *Madden* case, now pending before the Arizona Supreme Court (No. 1745), is typical of a case presenting such circumstances. The trial testimony in *Madden* revealed a background of excessive drinking by the husband, beatings and abuse administered by him when he was drinking, with the result that Mrs. Madden had obtained a divorce and the custody of their only child. The *Madden* record showed, without contradiction, that Mrs. Madden carried a shotgun with her for protection in the wild country near the Superstition Mountains where she was living and that there had been disputes concerning child visitation.

The trial court overruled defendant's objection to permitting the State to challenge for cause jurors opposed to the death pen-

alty under any circumstances. Thereupon a total of eleven jurors were excused for objection to the death penalty out of a total panel of fifty-three. As a result of the exercise of the State's challenges for cause, no one was on the jury who was unwilling to inflict the death penalty. Numerous prospective jurors who could not do so had been eliminated. Yet, at the end of the case, the prosecuting attorney did not ask for the death penalty, the jury was not instructed concerning it, and, although the jury was instructed over defendant's objections concerning first degree murder, a verdict of second degree murder was returned.

The other factual considerations that should be before the Court concern the possible retroactive effect of a determination in favor of petitioner. The *Witherspoon* case itself presents the question of retroactivity, since the case is here on collateral attack of a conviction affirmed in 1964. The Illinois Supreme Court stated that petitioner contended, for the first time, in subsequent habeas corpus proceedings that the disqualification for cause of jurors having scruples against capital punishment violated his right to a trial by a jury which was fairly representative of a cross section of the community and subjected him to trial by a jury which favored the prosecution in deciding the issue of guilt or innocence. 224 N.E.2d at 262. In *Madden,* and in perhaps other cases now awaiting decision on appeal, the issue of the propriety of disqualification of jurors for cause who have such scruples against capital punishment was squarely raised prior to trial and on appeal. To the extent that the Court holds that there can no longer be disqualification for cause of jurors opposed to capital punishment, the holding should extend, at the minimum, to cases in which the issue was raised at trial, preserved on appeal, and as to which there has as yet been no exhaustion of direct appellate review.

These facts are brought to the attention of the Court for the purpose of rounding out the picture presented in *Witherspoon. Witherspoon* is the case of an actual death sentence from a death

qualified jury. But the Court, in deciding this question, will necessarily have before it the situation of the death qualified jury where the death qualification is for tactical purposes only and there is no actual likelihood that the death penalty will even be asked for.

Summary of Argument

The systematic exclusion from the jury for cause rather than by peremptory challenge of all persons who object to the death penalty denies to a defendant equal protection of the laws under the Fourteenth Amendment of the Constitution, due process of law under that same amendment, and further denies a trial by an impartial jury under the Sixth Amendment. To give to the prosecutor the sole discretion to obtain a death qualified jury denies to defendant equal protection since a death qualified jury is basically different from one that is not so qualified.

Use of death qualified jury has two constitutionally significant faults: (1) The process of death qualification deprives the defendant of a significant cross-section of the community of prospective jurors; and (2) the prosecution is allowed to fill the jury box with jurors who are, consciously or unconsciously, prosecution oriented to such a degree that they are in fact biased against the defendant, not only as to punishment, but, more important, as to guilt.

Although the practice of death qualification has developed in virtually all of the states, the death qualification is not constitutional and the authorities permitting it should be overruled. The contention that a juror with conscientious scruples against capital punishment is unable to determine whether a defendant is guilty or innocent is fallacious. Moreover, one cannot assume such a fixity of conviction on the part of a juror concerning the death penalty as an immunity from changing his mind. The essence of the jury system is the interchange of ideas among the jurors and the persuasion by those who can accept the penalty of those who cannot that it should be imposed in a particular case. In any event, how-

ever, in view of the historic function of juries to cause development of law where jury resistance makes a particular manner of proceeding impossible, a de facto abolition of capital punishment by jurors unable to impose it is not automatically objectionable.

The vice of death qualification is that it deprives a defendant of a jury representing a true cross section of a community and results in the obtaining of a jury actively prejudiced against the defendant on the question of guilt. Sociological studies and writings of trial attorneys confirm that death qualified juries are inclined to be more authoritarian than jurors excused from duty because of death scruples and that death qualification tends to eliminate jurors most capable of evaluating verbal evidence and arguments.

The practice of death qualification squarely conflicts with the defendant's constitutional right under the Sixth Amendment to the right to a trial by an impartial jury. The exclusion of fifty percent of the population who do not believe in the death penalty operates to deny the impartiality and a jury of one's peers guaranteed by the Sixth and Fourteenth Amendments. The death qualification also denies equal protction of the laws in that the cross section of the community represented by the jury is not a valid cross section. Numerous authorities proscribe the exclusion of prospective jurors by class.

Even in a case where there is some actual likelihood or possibility of the death sentence being imposed, a juror should not be excused for cause because he is opposed to the death penalty. Such disqualification only gives the prosecution extra challenges not available to the defendant. However, in cases where, after a death qualified jury is obtained, the prosecution does not then ask for the death penalty the practical result is that the prosecution is able to obtain a jury of the desired mental complexion and to purge the jury of persons it does not want, first by peremptory challenge, and second for cause. If the prosecution desires to utilize its peremptory challenges to exclude persons opposing the death

penalty, it certainly is entitled to do so. But the practice of death qualification permits the court to do the striking for the prosecution and to give it additional exclusions that are not available to the defense. This bonus is no longer logically or legally justifiable.

Sociological studies demonstrate that the elimination of even one potential juror of a particular point of view may very radically affect the jury's decision as to the question of guilt or innocence. Particularly in cases where the guilt or innocence of the defendant is in doubt, the defendant should be entitled to a jury that is willing to consider impartially all of the evidence before it. The requirement that a defendant must have a fair and impartial trial does not permit a trial by a jury loaded against the defendant by exclusion of the tender minded. To the extent such persons constitute a cross section of the community, they should be included on jury panels; the prosecution, if it believes them to be undesirable members of the jury, should utilize its peremptory challenges to remove them, rather than having the court exercise its challenges for cause.

The *Witherspoon* case also presents the issue of the extent of retroactive application of a holding that the death qualified jury is no longer constitutionally permissible. Petitioner should, of course, be given the full benefit of such a ruling. Beyond that, however, the ruling should extend at a minimum to others situated in Mrs. Madden's position who have not as yet exhausted their remedy of direct appellate review. It should also be extended to those whose convictions have become final, since the prejudice resulting from a death qualified jury goes to the heart of the fact-finding process.

ARGUMENT

I. *The Systematic Exclusion from the Jury for Cause Rather than by Peremptory Challenge of Persons who Object to the Death Penalty Denies the Constitutional Rights of the Defendant.*

This jury in the *Witherspoon* trial was what is technically known as DQ—it was Death Qualified.* This function was performed for the prosecution by the court itself; the removal of those citizens to whom the death penalty is abhorrent was made "for cause," without using any of the State's peremptory challenges. Where a "tough" jury is impaneled, all other questions in the case are to be determined by persons of a particular mental makeup.

The selection of a Death Qualified jury (hereafter a DQ jury) operates not only to eliminate from the jury those with a Death Scruple (hereafter DS) but that it does much more. A DQ person is a different kind of person from a DS person for more reasons than this difference alone; other differences intertwine with this one. A DQ jury is "tough" in many ways other than in its willingness to give a death penalty. This constitution of a jury deprives a defendant of equal protection of the laws under the Fourteenth Amendment of the Federal Constitution and denies a trial by an impartial jury under the Sixth Amendment, as well as "due process of law" under the Fourteenth. The utilization of DQ procedures, depending solely upon whether a prosecutor announces in advance that he contemplates asking for a death penalty deprives a defendant of equal protection in that persons charged with similar crimes but not faced on voir dire with the death penalty are given access to a basically different type of jury than other defendants.

* A DQ jury may be distinguished from a jury containing persons who object to the death penalty, and this has been referred to as a DS (Death Scruple) jury. We use these terms in this brief, following usage of Robert F. Crosson, *An Investigation into Certain Personality Variables Among Capital Trial Jurors* (Ph.D. thesis, Western Reserve University, 1966), hereafter referred to as Crosson.

Not only does the death qualification of a jury deprive a defendant of a significant cross-section of the community of prospective jurors; it also—as we shall presently show—allows the prosecution to fill the box with jurors who are, consciously or unconsciously, prosecution oriented to such a degree that they are in fact biased against the defendant, not only as to punishment, but, more important, as to guilt.

A. *Development of the Practice of "Death Qualification" of Jurors.*

The first statutes assessing capital punishment in the United States did not provide for alternative modes of punishment — a finding of guilt required a punishment of death.* Under such a statutory scheme, the juror who had conscientious scruples against the imposition of the death penalty was inherently unsatisfactory as a juror in a capital case since his scruples in regard to capital punishment would impinge upon his ability objectively to determine guilt. Such jurors were known to have refused to find guilt where the evidence supported such a result because a guilt finding violated their conscientious scruples against imposing the death penalty. In order to preclude such jurors from subverting the jury's sworn obligation to determine guilt or innocence according to the evidence in the case, the practice of "death qualifying" the jury developed. This practice allowed the prosecutor to challenge *for cause* any juror who had conscientious scruples against the imposition of the death penalty. Many jurisdictions enacted statutes disqualifying jurors in capital cases who had such conscientious scruples.** Where such statutes were not enacted, the same result was reached through judicial interpretation. Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U.Pa. L. Rev. 1099, 1106 (1953), hereafter cited as Knowl-

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* Bye, *Recent History & Present Status of Capital Punishment in the United States,* 17 J. Crim. L. 234, 236 (1962).

** In Arizona, the present-day counterpart of an earlier statute of this type is found in Arizona Rule of Criminal Procedure 219 A (14).

ton. Many state legislatures also amended their statutes which required capital punishment in all murder cases to allow the jury, in its discretion, to impose either the death penalty or life imprisonment.*

The leading authority on death qualification of jurors describes this development in the following words:

> "With the humanitarian trend away from capital punishment as a mandatory punishment for certain offenses, there was a broad-scale amending of statutes establishing capital crimes. The pertinent compromise adopted was one of watering down the automatic death sanction to the discretionary variety now in vogue. The discretion was placed in the jury. But the related challenge-for-cause statutory provisions were left in pristine form. The result in most capital jurisdictions is that, while the statute defining the particular crime empowers the jury to mitigate the penalty, the statute disqualifying jurors with scruples against the death penalty still speaks in terms of reservations against *conviction* rather than as to *punishment*." Oberer, *Does Qualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 Texas L. Rev. 545, 550-51 (1961), hereafter cited as Oberer. (Emphasis in original) (Footnotes omitted).

B. *The Death Qualification Practice is Not Constitutional. The Cases Permitting it Should be Overruled.*

The position we advance in this case conflicts with the weight of opinion the country over. For recent cases see *People v. Miller*, 53 Cal. Rptr. 720 (1966); *People v. Hobbs*, 35 Ill.2d 263, 220 N.E.2d 469, 472-73 (1966); *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118 (1966); *People v. Gilbert*, 47 Cal. Rptr. 909, 408 P.2d 365 (1965), and 48 A.L.R.2d 560. For a recent comprehensive review of federal cases reaching a result adverse to our

* Such statutes also divided murder into degrees. Knowlton, *supra* at 1102. Arizona law has provided for jury discretion on punishment since Territorial days. A.R.S. Sec. 13-452. However, the practice of death qualification of jurors received early approbation in *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948 (1906). Such approval has continued to date.

position, see *Pope v. United States,* 372 F.2d 710 (8th Cir. 1967). For a recent illustration of what we think is the wrong position, see *State v. Reynolds,* 43 N.J. 597, 206 A.2d 750, 753 (1965), holding that "a juror with conscientious scruples against capital punishment is obviously incapable of determining the appropriate punishment from the evidence at the trial."

This, we submit, is wrong. A juror with conscientious scruples against capital punishment can determine the appropriate punishment from the evidence at the trial. He can determine first that the defendant is guilty or innocent, and if guilty, he can assess the maximum imprisonment. Cases to the contrary of the majority are illustrated by *State v. Lee,* 91 Iowa 449, 502-03, 60 N.W. 119 (1894); *State v. Wilson,* 234 Iowa 60, 11 N.W.2d 737 (1943); *State v. Garrington,* 11 S.D. 178, 184, 76 N.W. 326 (1898) (dictum); see also *Boyington v. State,* 74 Fla. 258, 76 So. 774 (1917). *State v. Lee, supra,* was a murder case in which the jury had exercised its discretion by assessing the death penalty. On appeal the Supreme Court of Iowa was confronted with the contention that the trial court had improperly dismissed for cause three jurors with scruples against the death penalty. The court reversed the conviction, stating that though the latter was a "ground of challenge for implied bias" under an earlier Iowa statute, it had been omitted in a later statutory revision and thus was unavailable to the prosecution. The court added, by way of explanation:

> ". . . It cannot be said that the state is entitled to have the punishment by death inflicted in any case. The statute authorizes that punishment, in the discretion of the jury, when a person is convicted of murder in the first degree; but the state has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorily those who have such objections." *Id.* at 502-03, 60 N.W. at 121.

In what must be the typical situation, none of the eleven jurors challenged for cause in *Madden* indicated that he could not fairly

and objectively determine the question of guilt. "Since a juror could impose life imprisonment, it is difficult to see how scruples against the death penalty could prevent convictions." Knowlton, *supra* at 1106. It is only after guilt has been determined that the jury's discretionary role as to punishment comes into play.

Moreover, one cannot assume such fixity of conviction on the part of a juror as an immunity from changing his mind. The judgment as to each and every juror cannot be made until all of the evidence is in. The whole function of juries, as a minute cross-section of the community, is to have an interchange of ideas. Those who can accept the death penalty may try to persuade their brothers who cannot and by the same token, those who cannot accept it can seek to persuade those who are willing to apply it. It is also said that to allow a person with a death scruple to sit on a jury would work a *de facto* abolition of capital punishment; see *Piccott v. State,* 116 So.2d 626 (Fla. 1959). We cannot regard this as automatically objectionable. One of the very good functions of juries, and one of its classic uses, is to cause development of law where jury resistance makes a particular way of proceeding impossible.*

C. *The Death Qualification of the Jury Deprives a Defendant of a Jury Representing a True Cross-Section of the Community.*

In the *Madden* case, eleven potential jurors out of a total panel of fifty-three were eliminated because of objection to the death penalty. This is, of course, too small to be a significant sample; we suggest that the country over the proportion might well be much larger. The death penalty itself is on the wane; the report of the President's National Commission on Crime is that during 1966

* Jury resistance to death sentences in criminal cases is precisely what caused the modification of the harsh penalties of 17th Century law, and a better century's work juries have never done. The phenomenon of jury attitudes towards particular offenses and their effect on law enforcement is considered analytically in Kalven and Zeisel, *The American Jury* 76 ("The jury's war with the law is now a polite one") and 286-97 (unpopular laws) (Little, Brown & Co., 1966).

only one person was executed in the United States. (Report, p. 143.) In 1965, sixty-seven persons were sentenced to death and sixty-two were reprieved. This decline reflects a popular attitude of opposition to the death penalty, as reflected in 1966 Gallup Poll figures which show that fewer than half the persons interviewed favored retaining it.

We, of course, acknowledge that not all persons who are opposed to the death penalty would refuse to apply it. But whatever the precise proportion is, the number is clearly so substantial that the elimination of them by a death qualification process is the elimination of a very large portion of the American population.

D. *Death Qualification of a Jury Actively Prejudices Defendants on the Question of Guilt.*

If the only matter involved in a death qualification were whether the death penalty was to be inflicted, the matter would not have the gravity which we attribute to it. In the *Madden* case, for example, no death penalty was ultimately asked of the jury, much less imposed, and in this sense the defendant was not hurt. Since, as we have shown, the number of death sentences the country over is almost negligible, if this were the only matter involved, it might be of small importance.

But more is involved. A death qualified juror not only has a particular attitude on the death penalty; he also has certain other related attitudes which affect his determination of the question of guilt or innocence. Jurors who have no conscientious scruples against capital punishment are prosecution oriented in that they are biased in favor of guilt.

In the *Madden* case, trial counsel as an experienced practioner knew what the prosecution was up to. He objected:

> ". . . We believe that is improper. And we would like to very briefly point out to the Court that we believe that if a prospective juror can bring in a death penalty in a case, as he certainly can in Arizona, he shouldn't be subject to a challenge for cause, but only to a peremptory challenge. We just think

that to do otherwise is to more or less pick a hanging jury. Most of us can agree, we think, as an abstract thought, that capital punishment—it is certainly my belief that most of us agree is not a wise policy. But we are faced with another right as a cold fact, that those liberal minded, intelligent jurors do have scruples against it. And the result in the end the most important criminal, or let's say murder cases, is that the jury consists of hard headed ultra conservative people. In fact, the defense has got to prove beyond all doubt. The necessity of proving guilt beyond a reasonable doubt is virtually abolished." T.A. 12-13.

Other trial attorneys have similarly commented on the subject in their writings. See McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania,* 30 Pa. B.A.Q. 252 (1959); Oberer, *supra* at 556.

What the lawyer knows from experienced instinct, the psychologist can demonstrate by study. In the doctoral thesis of Dr. Crosson, cited earlier, the questions are thoroughly considered. The Crosson study, though small, is a strong indication that death qualified jurors are inclined to be more authoritarian than jurors excused from duty because of death scruples. Death qualification tends to eliminate jurors most capable of evaluating verbal evidence and arguments. Willingness to impose the death penalty reflects a higher level of hostility than the unwillingness to do so. We attach an extensive quotation from Dr. Crosson's work as an Appendix to this brief. On the nature of the authoritarian personality, see *The Authoritarian Personality,* Adorno, Frenkel-Brunswik Levinson & Sanford (Harper 1950), which defines the term as including "extra-punitiveness." *Id.* at 405-14.

The Crosson conclusions are confirmed by the work of Dr. Cody Wilson, a social psychologist and education psychologist at the University of Texas. Based upon a study of two hundred young adults, he concluded flatly that "people who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant." *The Texas Observer,* Nov. 27, 1964, p. 5. He also found that such persons are more likely

to be biased against insanity as a defense. Again, the full statement is contained as an Appendix to this brief.

These conclusions are independently confirmed by work in the University of Chicago jury study. See report of study made by Dr. Hans Zeisel in the *National Observer,* August 30, 1965, p. 5:

> "Mr. Zeisel interviewed 1,248 jurors in Chicago and Kings County (Brooklyn, New York). On the afternoon of the last day of each juror's term of service, the juror was asked about the decision he actually had made. Jurors were rated as 'defense-prone' or 'prosecution-prone' on the basis of several criteria. The principal factor was a comparison from the juror's vote on the first ballot in a case with the vote of his fellow jurors. Mr. Zeisel then tried to determine what characteristics of jurors show a 'decisive correlation' with 'prosecution proneness'. He found just one such characteristic: lack of scruples about giving the death penalty. According to his figures, jurors who have no such scruples are about 28 percent more prosecution-prone than those who have 'major scruples' against the death penalty."

In short, the death qualification procedure locks out persons who in terms of their whole mental makeup are most likely to take the most open-minded approach to the whole task at hand. That is undoubtedly why the procedure is followed in cases in which there is no intention at all of actually asking for a death penalty.

E. *Death Qualification Conflicts with Constitutional Rights.*

(a) *Sixth Amendment Rights:*

As the Supreme Court has recently noted:

> "[The] Sixth Amendment [is] made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury—. . .'" *Parker v. Gladden,* 385 U.S. 363, 87 Sup.Ct. 468, 470, 17 L.Ed. 2d 420 (1966). See also *Turner v. Louisiana,* 379 U.S. 466, 472-73, 85 Sup.Ct. 546, 550, 13 L.Ed.2d 424 (1965).

This right to an impartial jury was thought by Thomas Jeffer-

son to be one of the handful of "principles [which] form the bright constellation that has gone before." Jefferson's First Inaugural Address, March 4, 1801. Moreover,

> "the very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

The death qualification practice flatly conflicts with these standards. A person is entitled to be tried by a jury of his peers. In any given case, a very large portion of the people of the United States, the peers of the defendant, believe that the defendant should not be executed. The exclusion of all those persons leaves a fifty percent peerage at best. The law of "impartiality" under the Sixth Amendment is so intertwined with the principles of equal protection under the Fourteenth that we incorporate herein our Fourteenth Amendment discussion immediately following. As is fully developed there, the exclusion or preference of particular classes in the society of potential jurors can violate the Fourteenth Amendment. The matter is by no means limited to race, religion, or ethnic inclusions or exclusions. When the question arose as to whether a person could be charged with dope peddling before a jury composed entirely of Government employees, the Court held first, that there was no showing that the panel had been composed heavily of Government employees except by chance, and second, that the defendant had contributed to the composition of the jury himself. *Frazier v. United States*, 335 U.S. 497, 69 Sup.Ct. 201, 93 L.Ed. 187 (1948). The Court majority interpreted impartiality "as a state of mind." Four dissenting Justices found, even in those circumstances, "a one-sided outlook on problems before it." The dissenters believed that there was no use in giving the two sides equal peremptory challenges when "the cards were stacked from the beginning." See also *Dennis v. United States*, 339 U.S. 162, 70 Sup.Ct. 519, 94 L.Ed. 734 (1950), another Government employee case under different circumstances, in

which Justice Black in dissent used words we think highly applicable:

> "Nor should the Government want such an unfair advantage. Of course this advantage makes convictions easier. That is precisely what the Sixth Amendment was designed to prevent. It commands impartiality in the jury-box." 339 U.S. at 180.

See also *Labat v. Bennett,* 365 F.2d 698, 727 (5th Cir. 1966), a case involving the exclusion of classes of manual laborers from the jury. There such a "systematic exclusion" deprived "the petitioners of an impartial jury, a cross-section of the community, in violation of the due process and the equal protection clauses of the Fourteenth Amendment." As was developed fully previously and as is even more fully developed in the Appendices, death qualified jurors are not "impartial"; they are biased in favor of the prosecution, at least as compared with a true cross-section of the community.

(b) *Fourteenth Amendment Rights*

The death qualification system denies equal protection of the laws. It excludes a significant segment of the community so that the jury, as finally constituted, is not a valid cross-section. Under the Equal Protection Clause, selection of the jury in such a manner is wholly improper:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised." *Smith v. State of Texas,* 311 U.S. 128, 130, 61 Sup.Ct. 164, 165, 85 L.Ed. 84 (1940).

See also *Billingsley v. Alabama,* 359 F.2d 13, 16 (5th Cir. 1966):

> "[T]here is no expressed constitutional provision as to the classes of persons entitled to render jury service . . . the law does require that qualified persons not be excluded from jury service on a class basis. Systematic and purposeful exclusion of qualified persons cannot be reconciled with the American concept of an impartial trial."

Amicus does not seek "a perfect mirror of community nor [one which] accurately reflect[s] the proportionate strength of every identifiable group." *Swain v. State of Alabama,* 380 U.S. 202, 85 Sup.Ct. 824, 13 L.Ed.2d 759 (1965). She simply seeks to have some jury representation from a readily identifiable significant segment of the community and to be free from an arbitrary and invidious procedure.

> "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government . . . Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted." *Glasser v. United States,* 315 U.S. 60, 85-86, 62 Sup. Ct. 457, 86 L.Ed. 680 (1942) ("cross-section of the community . . ."; representative group required).

Earnest objectors to the death sentence are "fenced out" from jury duty in the same manner as voters were unconstitutionally fenced out by exclusion of military personnel. *Carrington v. Rash,* 380 U.S. 89, 94, 85 Sup.Ct. 775, 13 L.Ed.2d 675 (1965).

The rule against exclusion by class is represented by the race cases, *Eubanks v. State of Louisiana,* 356 U.S. 584, 78 Sup. Ct. 970, 2 L.Ed.2d 30 (1958), but the very same principles apply to any other category of exclusion which interferes with obtaining a representative jury. For discussion of other elements required to make the cross-section, see *Ballard v. United States,* 329 U.S. 187, 192-93, 67 Sup. Ct. 261, 91 L.Ed. 181 (1946). As illus-

trations of other areas where exclusion of a class has been held to contravene the principle that the jury must represent a cross-section of the community, see *Labat v. Bennett,* 365 F.2d 698, 727 (5th Cir. 1966) (manual laborers, outside workers, artisans, and earners making a daily wage); *White v. Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (leading case on inclusion of women on state juries); *Hernandez v. State of Texas,* 347 U.S. 475, 74 Sup. Ct. 667, 98 L.Ed. 866 (1954) (Mexicans); *Schowgurow v. State,* 240 Md. 121, 213 A.2d 475 (1965) (atheists, agnostics or adherents to Oriental sects); *State v. Madison,* 240 Md. 265, 213 A.2d 880, 885 (1965) (member of "Apostolic Faith" sect could challenge unconstitutionality of exclusion from his jury of atheists, agnostics and believers in Oriental religions); *Juarez v. State,* 102 Tex. Cr. R. 297, 277 S.W. 1091 (1925) (Catholics).

Women, we suspect, are more likely than men to object to the death penalty; death qualification is to that extent a discrimination against women. Religion is more than a matter of faith, it is a matter of intellectual commitment, and some religions are particularly opposed to man-made death. The rule operates necessarily as a discrimination against this cross-section of the community, and thereby denies equal protection of the laws. And it operates as a discrimination against petitioner, who has a constitutional right to be free from discriminatory class exclusion in the selection of the jury empaneled to try his case.

F. *The Blue-Ribbon Concept; Herein of Fay v. New York, 332 U.S. 261, 67 Sup. Ct. 1613, 91 L. Ed. 2043 (1947).*

The leading United States Supreme Court case of specially constituted juries is *Fay v. New York, supra,* the New York Blue-Ribbon Jury case. Under the New York system, a general jury panel was created. From the general jury panel, a special or blue-ribbon panel was drawn. For example, those who had been found guilty of misconduct by a civil court were excluded. One ground of the exclusion was for those whose conscientious opinions would not allow them to find a defendant guilty if the crime charged

was punishable by death.* The *Fay* petitioners attacked the blue-ribbon jury on the grounds that it was not drawn from a cross-section of the community and that certain biases inhered in that class from which it was drawn.

The Supreme Court, in a 5-4 decision, upheld the statute. The Court found "nothing in the standards New York has prescribed which, on its face, is prohibited by the Constitution." 332 U.S. at 272. The majority opinion noted that there had been no objection on this ground at the trial court level, 332 U.S. at 282. It also held that it would not impose federal standards upon the composition of trial court juries except in extremely limited situations. Nonetheless, the opinion makes clear that elimination of a class, whether by policy or by a practice of discrimination, over a long period of time, in a purposeful manner, is unconstitutional. The opinion reiterated that a proper jury system required an impartial cross-section of the community; there may be no system in which "courts are organized to convict," 332 U.S. at 294.

Four Justices dissented, emphasizing the requirements that a jury be "fairly drawn from a cross-section of the community," and that it be chosen on a "representative basis." The dissent found that "we can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof." 332 U.S. at 300.

We contend that under both the majority approach and the minority approach in *Fay*, a death qualified jury does not meet the test of being a cross-section of the community. We know more clearly now than we did twenty years ago of the prejudicial effects of this exclusion. The classes which are recognized by the equal protection clause are not static, and are subject to change. *Hernandez v. Texas*, 347 U.S. 475, 478, 74 Sup.Ct. 667, 98 L. Ed.

* It will be noticed that in the New York law the exclusion was not of those who would not apply the death penalty but of those who would not find a defendant guilty because of the death penalty, a distinction developed earlier in this brief.

866 (1954). The rule "applies to any identifiable group in the community which may be the subject of prejudice." *Swain v. State of Alabama, supra,* 380 U.S. at 205. Those who are stricken on a death qualified jury have now become so large a number and so substantial a group as to make them a class which cannot be excluded from juries.

II. *The Method and Effect of Discrimination in the Non-Death Sentence Cases.*

In cases like *Witherspoon,* there is at least an actual likelihood or possibility of the death sentence being imposed. But in many cases, the death qualification of the jury is purely for purposes of maneuver; the application for the death sentence is a sham, to be abandoned or not seriously pressed as soon as a jury of the desired mental complexion is achieved. The practical result is that the prosecution has two means of purging the jury of the people it does not want, the first by peremptory challenge, and the second for cause. The object of this strategy of the prosecution may be put in the classical language of Jamesian philosophy as a matter of segregating the "tough minded" from the "tender minded." But such classical language is not commonly used by lawyers in the midst of their trade. In their terms, "We're going to get the bleeding hearts off the jury and have only the hard nosed left."

If the prosecution wishes to use its peremptory challenges to exclude persons of this point of view, this is a problem for the prosecution. Peremptory challenge, may be arbitrary, for a good reason or a bad one. *Swain v. State of Alabama,* 380 U.S. 202, 85 Sup. Ct. 824, 13 L. Ed. 2d 759 (1965). But by death qualification the prosecution in *Madden* had the court do its striking for it by exclusions for cause. The prosecution is thus given an extra batch of exclusions that the defense does not have—the prosecution is able to make its strikes after the court has already stricken the tender minded because of their points of view.

The grant to the prosecution of this challenge for cause bonus

is no longer logically or legally justifiable. Under the common-law practice, challenges for cause of jurors were divided into two classes: principal challenges, or challenges for principal cause; and challenges to the favor. The principal challenge showed a cause which positively, or by necessary legal implication, disqualified the juror from sitting in the case. The challenge to the favor was grounded on circumstances raising a suspicion of the existence of actual bias in the mind of a juror for or against a party. Since a challenge for principal cause "imports absolute bias or favor [it] leaves nothing for the discretion of the court." 31 Am.Jur. *Jury*, Sec. 157, p. 138.

Grounds for challenge at common law for principal cause or for bias implied by law included having conscientious scruples against capital punishment in a capital case. (*Ibid.* and numerous cases cited in the historical discussion in this brief.)

We have previously demonstrated that, with the advent of jury discretion in determining punishment, the original reason for automatic presumption of bias against conscientious scruples jurors had no continuing validity. However, the common law "implied bias" resulting in a challenge for cause has been allowed to remain, despite the fact that it no longer has any legitimate function to perform.

A juror's conscientious scruples against the death penalty would not necessarily affect his ability to decide the guilt innocence question, which is the principal matter entrusted to the jury for determination. Whatever logical basis there may have been historically for the challenge for cause procedure, such no longer exists given the present statutory scheme. Thus it should no longer be continued.

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States v. Wood*, 299 U.S. 123, 145-46, 57 Sup.Ct. 177, 185, 81 L.Ed. 78 (1936).

In view of the tremendous leverage this procedure provides to the prosecution in a capital case, and the manifest unfairness it causes to the defendant, we submit that it should no longer be followed. The prosecution should be able to do its work and protect the legitimate interests of the State through use of the peremptory challenges provided it. The combination of unlimited challenges for cause with the ten peremptory challanges given by law to the prosecution gives to the peremptory challenges a multiplier-effect not intended by the statute authorizing them. For some analogous practical considerations created by this practice, see the discussion in the dissenting opinion of four Justices, *Frazier v. United States, supra.* The case, it will be recalled, dealt with Government employees on the jury and what it said there of the practical problems applies here as well:

> "The Government was confronted by no occasion to use any of its peremptory challenges to get rid of its adversary's employees. The defendant was. But if the defendant should try to use his challenges to excuse employees of the Government, he would dismiss one only to incur a probability of getting another. If he exhausted his challenges in this effort, it would still be futile, for no one claims he had enough to displace them all. It might not be wise tactics to show suspicion or disapproval of a class some of whom will have to sit anyway. Moreover, if he used his challenges as far as they would go to dislodge government servants, it would leave him helpless to challenge any of the non-government jurors, for which challenge he might have good reason." 335 U.S. at 518.

The elimination of even one potential juror of a particular point of view may very radically affect the question of guilt or innocence. The Chicago Jury Studies show that in 79 actual cases in which the jury's first ballot produced "not guilty" votes of three or less, the ultimate verdict in every case was "guilty." But where the original minority was four or five, hung juries were produced in 19 percent of the cases. Kalven & Zeisel, *The American Jury, supra,* p.462; Broeder, *The University of Chicago*

Jury Project, 38 Neb. L. Rev. 744, 747-48 (1958). Thus, two dissenting jurors are virtually certain to give in, while if they are joined by two more, the result may well be different.

All of which is to say that one juror may make a difference. A defendant is entitled to a fair and impartial jury, not one loaded against him by exclusion of the tender minded.

III. *The Court's Ruling Should Be Extended To The Petitioner Himself As Well As To Those Cases In Which The Death Qualification Has Been Preserved And The Remedy Of Direct Appeal Has Not Yet Been Exhausted.*

In addition to its determination whether, as a matter of prospective determination, the practice of challenging for cause all prospective jurors opposed to or having conscientious scruples against capital punishment must be terminated, the Court will have to determine, either in this case or some other, the question of the extent of retroactive application to be given a holding that the practice of death qualification of jurors violates a defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution. The *Witherspoon* case itself raises the retroactivity issue, since the case is here to review the dismissal of a petition for habeas corpus following a conviction that was affirmed in 1964.

Beyond the *Witherspoon* facts themselves, however, the question is presented as to the effect of a ruling favorable to petitioner upon others, such as Mrs. Madden, who are similarly situated. The trial in the *Madden* case occurred in June, 1966. The death qualification issue was squarely raised at the trial and was ruled upon adversely to the defendant by the trial court. An appeal was promptly taken that has not yet been argued or determined by the Arizona Supreme Court. Presumably a number of other cases are in a similar posture as attacks upon the death penalty and the death qualification question have become more frequent. Still a third class of case is presented by those in which convictions have

become final either by failure to take an appeal or by affirmance of the conviction but where the contention might be available in a collateral post-conviction proceeding that the defendant was prejudiced by the empaneling of a death qualified jury.

If anyone is entitled to the benefit of a ruling that the practice of death qualification is no longer constitutionally permissible, the petitioner should be. As the Court recognized in *Stovall v. Denno,* 388 U.S. 293, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199 (1967), at a minimum petitioners who successfully bring their cases before the Court are to be given the benefit of the Court's ruling as "an unavoidable consequence of the necessity that constitutional adjudications do not stand as mere dictum."

In view of Mrs. Madden's participation in *Witherspoon* as an amicus, she too should be given the benefit of its decision. Beyond this fortuity, however, we submit that the Court's ruling should extend, at the least, to other persons similarly situated whose remedy of direct appeal has not yet been exhausted and who have properly preserved the death qualification issue, as well as those whose trials will occur following the Court's decision.

The Court's opinions regarding the retroactive application of its major decisions expanding the scope of a defendant's constitutional protections teach that where the rule in question affects "the very integrity of the fact-finding processes," and averts "the clear danger of convicting the innocent," the rule will be retroactively applied. *See Tehan v. United States ex rel. Shott,* 382 U.S. 406, 409, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966). *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), have been such cases. Other examples of decisions retroactively applied to convictions becoming final before their decision are *Griffin v. Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (right to transcript on appeal), and *Anders v. California,* 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493

(1967) (standards concerning submission of an appeal by appointed counsel for determination of fundamental error).

Although "the Constitution neither prohibits nor requires retrospective effect" to be given a particular rule, *Linkletter v. Walker,* 381 U.S. 618, 629, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), the determination as to whether to apply a decision retrospectively is to be made by weighing the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Virtually all of the Court's rulings have been held applicable to cases where the remedy of direct appeal had not yet become final at the time of decision. *See, e.g., Linkletter v. Walker,* 381 U.S. at 639-40 (*Mapp v. Ohio* held applicable to decisions not yet final as of the date of its decision); *Tehan v. United States ex rel. Shott,* 382 U.S. at 409 n. 3 (*Griffin v. California,* although not applicable to those cases in which appeal has been exhausted, assumed without question to be available to cases still pending on direct review at the time it was announced). In *Johnson v. New Jersey,* 384 U.S. 719, 727, 86 S. Ct. 1772, 16 L. Ed. 2d 853 (1966), where the Court held *Escobedo* and *Miranda* applicable only to trials occurring after their decision, *Davis v. North Carolina,* 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966), was held to permit allegations of a failure to comply with the *Escobedo* and *Miranda* requirements to be made as part of a coerced confession claim which, under *Jackson v. Denno, supra,* would be retroactive. As the Court stated in *Johnson v. New Jersey,* 384 U.S. at 729,

> "We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

Applying the complex of factors set forth in the Court's retroactivity decisions, it is apparent that a rule declaring unconstitutional the practice of death-qualifying juries should, at a minimum, be made available to persons whose right of appeal has not been

exhausted. The number of cases where the death qualification issue has been properly preserved is, in all probability, quite small, certainly far smaller than the number of casses affected by such rulings as *Smith v. Arizona,* __U.S.__, 88 S. Ct. 111, __ L. Ed. 2d __ (1967), holding *Anders v. California, supra,* to be retroactive and thus reopening all appeals submitted for determination of fundamental error without complying with the procedural safeguards required by *Anders.*

For all of the reasons given in the preceding sections of this brief, the practice of the death qualification creates a greater prejudice than the admission into evidence of the fruits of an illegal search and seizure or a confession as to which the requirements of *Miranda* have not been met. While the latter evidence may in and of itself be perfectly reliable and truthful, the prejudice resulting from a death qualified jury goes to the heart of the fact-finding process, the manner in which the jury views the evidence submitted for its consideration. To hold that a defendant's right to counsel at trial or on appeal or his protection against the admission into evidence of a coerced confession is retroactive would indeed be nugatory if the greatest possible source of prejudice to the defendant, a jury chosen for its hard-nosed, prosecution oriented tendencies, was permitted, because of the nature of its members, to consider the evidence without having properly weighed the various inferences permissible from the testimony and exhibits before it. The nature of this prejudice is so extreme that it is entirely possible that many innocent persons have been convicted by a jury not persuaded, because of its psychological makeup, of the defendant's innocence. Such a possibility alone requires that the death qualification decision, as has been done with other Sixth Amendment rulings, be made fully retroactive, this assuring all such persons affected by this issue of a new trial before a jury fairly representing a cross-section of the community.

We recognize, however, that such an across-the-board retroactivity holding might well be said to have an adverse effect on

the administration of justice because of the number of new trials that might be required and because of the reliance on prior state procedure that has led to the virtually uniform practice of death qualifying juries in capital cases. There is no countervailing reason, on the other hand, to limit the ruling in *Witherspoon* purely to prospective application. In view of the substantial prejudice to a defendant, particularly in noncapital cases, resulting from the use of a death qualified jury, and because, where the remedy of direct appeal has not yet been exhausted, such trials would not have occurred in the too far distant past, there would be no insuperable obstacle imposed to the granting of new trials in cases where such death qualification had occurred, the record had been properly preserved, and the remedy of direct appeal had not been exhausted. Such a ruling would properly strike a balance between the competing needs of fairness to the defendant, prior standards, the availability of other safeguards, the integrity of the fact-finding process, the danger of convicting the innocent, and the effect of a retroactive ruling upon administration of justice. For these reasons, the Court in *Witherspoon* should make the specific determination that its ruling extends, at a minimum, to such persons.

CONCLUSION

It is respectfully submitted that the practice of death qualifying juries violates the Fourteenth Amendment, regarded as an expression of the Sixth Amendment, or regarded as a matter of due process and equal protection. It is said that the application of these constitutional principles will as a practical matter put an end to the death penalty in the United States. If the death penalty can continue its barbarous existence only by excluding enormous numbers of conscientious citizens from juries, then it has existed too long.

Respectfully submitted

LEWIS ROCA BEAUCHAMP & LINTON

By John P. Frank
John J. Flynn
Paul G. Ulrich

March, 1968.

APPENDIX A.

Excerpt from Doctoral Dissertation of Robert F. Crosson, *An Investigation into Certain Personality Variables Among Capital Trial Jurors*, Western Reserve University, 1966.

VI. SUMMARY AND CONCLUSIONS

Summary

In 1961, Walter Oberer, writing in the *Texas Law Review*, examined a juridical matter having serious implications for fair trial observance in capital cases in those states where the death penalty may be levied. In this and a later article Oberer argued that because the jurors impanelled for service in capital trials cannot entertain any reservations with respect to the death penalty—that is, they must be "death qualified" to the satisfaction of the court—the defendant is faced with an inordinately antipathetic jury whose impartiality toward a possible sentence of death may supersede the more important issue of guilt or innocence. McClelland, another attorney who has served as both prosecutor and defense at various times in his career, puts the case even more strongly. He believes that a death qualified jury "consists of hard headed, ultra conservative people, and . . . the defense must prove innocence beyond all doubt" when the burden of proof should lie with the state. The capital jury, so death qualified, is alleged to be composed of people whom Oberer describes as "authoritarian personalities." Such a jury, it is argued, threatens the right of the capital defendant to a fair and impartial trial.

The present study undertook to investigate certain personality variables, including authoritarianism, in two groups of jurors: jurors who had served in capital trials and were therefore death qualified (DQ); and jurors who had served in non-capital cases and who professed scruples against the death penalty (DS).

Thirty-six jurors for each group were selected randomly from jury lists provided by the office of the Clerk of the Court of Common Appeals, Criminal Branch, County of Cuyahoga, Ohio.

The jurors subjects of each group were contacted by letter initially explaining that a "survey of critical issues" was being conducted by the University and that only responsible, civic-minded citizens, viz. jurors, were being surveyed. Following the letter a telephone call was made to the subjects and an appointment arranged with cooperating respondents. For the non-capital jurors contacted a death scruples screening had to be added in the telephone contact to insure exclusion of non-capital jurors who might be eligible for death qualified capital juries. The selection continued until the DQ and DS groups numbered 36 each.

The literature was reviewed relative to the psychosociological research on juries and jury functioning. It was shown that little jury investigation has been undertaken, with the notable exception of the Chicago Jury Project, and that no work has been done which approaches the problems posed in the present study.

The variables tested in this study, and the instruments used, were: 1) dogmatism, or closed-mindedness, or general authoritarianism, using the Rokeach Dogmatism Scale, Form E; 2) total opinionation, using the Rokeach Opinionation Scale, Form C; 3) political opinionation, using the Rokeach Conservatism-Liberalism subscale of Form C; 4) critical thinking with three subtests of the Watson-Glaser Critical Thinking Appraisal, Form AM; and 5) manifest hostility, utilizing the Siegel Manifest Hostility Scale.

Mean test scores were computed for each group and the difference between group means for each variable were tested for significance using the critical ratio method. Because a possible sex frequency differential might be confounding the results, a second set of critical ratios was performed to test dif-

ferences between male and female jurors from both groups. And finally intercorrelations of test scores were calculated for DQ and DS subjects.

The results supported the contention that rightist authoritarians (conservatives) are significantly more prevalent among death qualified jurors. There was also some evidence, though weak, that death scruples jurors are better able to think critically and evaluate verbal arguments than death qualified jurors. All but one of the variables showed differences between the juror groups in the expected direction. Sex differences in two of the variables (total opinionation and conservatism-liberalism) were significant and helped to explain some of the differences between the DQ and DS groups, but did not substract from the importance of the empirical differences between the juror groups. Some of the intercorrelations helped to clarify reasons for differences and similiarities between the groups.

Conclusions and Remarks

The opinions expressed by Oberer and McClelland were rationally developed as a result of their long experience in observing and working with jurors. The did not have the advantage of empirical findings which psychological or sociological research might have provided regarding personality characteristics of jurors. The present study represents the first attempt to examine personality variables among jurors, and although the investigation has been limited and circumscribed it has, hopefully, provided some empirical support for the opinions expressed by a few students of law regarding certain characteristics of death qualified capital juries.

Apart from this study's results pertinent to differences between DQ and DS jurors, the writer proposes to comment on other implications of this research which bear on the law as he sees the law. The writer professes no competency in the law and up to this point heavy reliance had been placed on the opinions and

discussions of the law relevant to juries as given in legal journals and articles. The following remarks are made without expertise in legal matters. Nevertheless there are aspects of the findings in this research which will bear more comment and which impinge on certain judicial areas as this interested citizen and researcher sees them.

In a democratic society, and under the American constitution, a "jury of peers" is a fundamental ideal. Practical considerations, however, serve to reduce the chances for wide citizen representation on juries. Jury exemption is one of these considerations (see Appendix A). Interested students might ask whether justice would be better served in a system where greater representation of the citizenry is included in juries, or whether competency requirements be made a part of jury selection. These are not new questions. Legal writers have considered the problems for a long time and at least one social scientist has grappled with the juror competency issue (James, 1959a), but the latter focused on relative competency levels within existing jury compositions.

Another question in jury selection has to do with whether the present system should be adjusted so that the full range of personalities in jury pools have equal likelihood of selection on all juries. It is this question to which the present study was related. Death qualification for capital juries is claimed by some to be a biasing factor against the defendant, a claim which receives support in the present research. Capital punishment is facing abolition in the thirty-seven states where it still exists. The gradual trend among the retaining states has been *de facto* abolition. The *de facto* status of capital punishment (only 21 executions in the nation in the last year) (1964) makes the death qualifier increasingly anachronistic and unnecessary. In the years until the death penalty is abolished, and in those "abolitionist" states where capital punishment is reserved for certain instances of murder (e.g., New York State, where recent legislation abolished the death penalty except in cases of murder of policemen or

prison guards) the voir dires for capital crimes might at least be freed of death qualifying restrictions. The finality of the death sentence makes normal human frailty in the jury box especially critical. If anti-authoritarian traits are as likely to be represented on the jury as authoritarian traits, then the results of this study suggest that removal of the death qualification from the capital voir dire would be a step in the direction of fairer representation which might better serve justice instead of just the prosecutor.

APPENDIX B

Professor Cody Wilson, University of Texas psychologist and sociologist, "Impartial Juries?" *The Texas Observer,* Jan. 15, 1965, p. 5.

IMPARTIAL JURIES?

Cody Wilson

Austin

Texas is one of several states that provide for "death qualification" of juries that hear and render decisions in "capital" cases. That is, in order to serve on a Texas jury that hears a case concerned with rape, murder, kidnapping, or armed robbery, a person must believe in capital punishment.

Professor Walter Oberer, formerly of the University of Texas law school, raised the question, in an article in the Nation last spring, whether such practices constitute a denial of fair trial to the defendant on the issue of guilt. He drew two conclusions, that the question had never been squarely presented to any court, and that due process is not a static concept, so that when the issue is presented, the testimony of expert witnesses from psychology may be relevant.

The question Oberer raises is a legal one and can be answered only by the courts. But behind the legal question lies a psychological one: Do people who believe in capital punishment differ from people who have scruples against capital punishment in other psychological characteristics so that a jury composed only of people who believe in capital punishment would be biased against the defendant?

In an effort to answer this question, and thereby perhaps to help the courts answer theirs, a research team of lawyers and psychologists at the University of Texas has gathered information from more than 200 adults, mostly junior and senior college students. Five capital cases were simulated; brief written descrip-

tions were prepared of the facts presented to the jury in each case. Each person was asked to assume, in each of the five cases, that he was a member of the jury and to reach a decision of guilt or innocence. He was asked to indicate the degree of confidence that he had in each of his decisions. He was asked the question the answer to which forms the basis of a "challenge for cause" in a capital case, "Do you have conscientious scruples against the death penalty, or capital punishment for a crime?"

Each person was also asked to agree or disagree with a series of statements, of which these are examples:

"The district attorney's interpretation of the facts in a criminal case is usually more reliable than the defense lawyer's."

"If two witnesses gave conflicting testimony in a criminal case, I would probably believe the witness for the prosecution rather than the witness for the defense."

"If I were a member of a jury, I could never vote 'not guilty' for a man whose defense was insanity."

"The plea of 'not guilty by reason of insanity' is a loophole that allows many criminals to escape punishment."

The number of statements similar to the first two that the subject agreed with was used as a measure of the tendency to be biased in favor of the prosecution. The number of statements similar to the latter two that the subject agreed with was used as a measure of the tendency to be biased against insanity as a defense plea.

Finally, each person was asked to assume the jury had agreed upon a verdict of guilty in each of the simulated cases. Now he was asked to recommend an appropriate punishment. The allowable punishments ranged from suspended sentence to life imprisonment but did not include the death penalty.

The research showed that people who believe in capital punishment differ from those who have scruples against capital

punishment in several characteristics related to jury performance:

(1) People who believe in capital punishment are more likely to judge guilty in response to the cases than are people who do not believe in capital punishment;

(2) People who believe in capital punishment are more confident of the correctness of their judgment of guilt and innocence;

(3) People who believe in capital punishment are likely to assess a more severe punishment—even without the death penalty—than are people who have scruples gainst capital punishment.

(4) People who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant; and (5) People who believe in capital punishment are more likely to be biased against insanity as a defense than are people who have scruples against capital punishment.

If we assume that the observed relationships hold among the adult population at large (and there is no reason for thinking that they would not), then we may conclude that a jury selected by systematically excluding people who have scruples against capital punishment is biased in the direction of being more likely to bring a verdict of guilty, being more confident of this decision of guilty, favoring the prosecution in opposition to the defense, being hostile toward the plea of not guilty by reason of insanity, and assessing a more severe punishment when the death penalty has been excluded from consideration.

If the existence in juries of such systematic biases against the defendant constitutes denial of fair trial, then we are violating one of our most cherished legal traditions with our current jury selection procedures in Texas. The person accused of a capital crime is not getting the fair shake to which we are all entitled.

MAR 1 1 1968

In the

Supreme Court of the United States

OCTOBER TERM, 1967

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE

Submitted By

AMERICAN FRIENDS SERVICE COMMITTEE,
COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST,
GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH,
THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY,
UNION OF AMERICAN HEBREW CONGREGATIONS,
CENTRAL CONFERENCE OF AMERICAN RABBIS
and
THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM

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The above religious organizations by their attorneys, Alex Elson and Willard J. Lassers and Elson, Lassers and Wolff, and Marvin Braiterman, move for leave to file a brief amici curiae in support of petitioner, William C. Witherspoon. In support of this motion the religious organizations represent as follows:

These organizations believe firmly that exclusion from the jury of individuals with conscientious scruples against capital punishment is a serious deprivation of the right to an "impartial jury" under the Sixth Amendment and to due process of law under the Fourteenth Amendment. Their reasons, which are set out in the attached brief relate to certain religious and ethical considerations which are of central importance to them. These considerations, moreover, are unlikely to be viewed by the parties in quite the way they are seen by them. Consequently they believe that they can make a contribution of their own to the understanding of the case.

All of the religious organizations joining in the attached brief have taken stands in opposition to the death penalty. Because these stands reflect the belief of a majority, or perhaps more of the nation's citizens, there are special aspects of the exclusion rule now at bar, of particular concern to the feligious organizations.

The organizations are:

1. AMERICAN FRIENDS SERVICE COMMITTEE.

This organization is a non-profit corporation chartered to carry on the religious, charitable, social, philanthropic and relief work on behalf of the several divisions and branches of the Religious Society of Friends (Quakers) in America. In the United States there are approximately 123,000 Friends, organized into 28 yearly meetings. The American Friends Service Committee has a vital interest in this litigation because Quakers have strongly opposed, for religious reasons the taking of life by the State and have cherished and nurtured the liberties of free men, including the right to trial by an impartial jury. Opposition of the Friends to capital punishment goes back over three hundred years to the beginning of the Quaker movement.

2. COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST.

The Council for Christian Social Action is an instrumentality of the United Church of Christ devoted to promoting education and action in international, political and economic affairs. The Council stated its position in opposition to capital punishment in a policy statement of January 30, 1962. The United Church of Christ has over ten million adherents.

3. GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH.

The General Board of Christian Social Concerns is an instrumentality of the Methodist Church. Its purpose is to further the works of the church in the sphere of social affairs. The Methodist Church at its 1960 General Conference adopted a statement opposing the death penalty. The statement was revised in 1964 and is now part of the Methodist Social Creed. The Methodists number eleven million members among their 25,000 churches which are situated in every state.

4. THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY.

The United Presbyterian Church adopted a statement condemning the death penalty at its 171st general assembly in 1959 and adopted a revised statement at the 177th General Assembly in 1965.

The United Presbyterian Church in the United States of America has a membership of 3,300,000. It has 9,000 churches throughout the nation.

5. UNION OF AMERICAN HEBREW CONGREGATIONS, CENTRAL CONFERENCE OF AMERICAN RABBIS, and THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM.

The Union of American Hebrew Congregations (UAHC) is composed of substantially all the reform Jewish congregations in the United States, numbering about 700, having a total membership of about 1,000,000. The Central Conference of American Rabbis (CCAR) is an association composed of substantially all the 1000 reform rabbis in the United States. The Commission on Social Action, as its name suggests, is the social action arm of Reform Judaism and is a joint effort of the UAHC and the CCAR. These organizations desire to express Judaism's centuries old position discouraging the taking of human life by judicial process.

The petitioner, William C. Witherspoon, by his counsel, has executed a consent in writing to the filing of the proposed amicus brief. This consent has been filed with the clerk.

The office of the Attorney General of the State of Illinois representing respondents has informed us that it is unable to consent.

Respectfully submitted,

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UNION OF AMERICAN HEBREW CONGREGATIONS,
CENTRAL CONFERENCE OF AMERICAN RABBIS and
THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM

The religious organizations on whose behalf this brief is filed believe that exclusion of veniremen who have con-

scientious scruples against capital punishment is a serious deprivation of the right to an impartial jury under the Sixth Amendment and of due process of law under the Fourteenth Amendment.

The interest of the amici is stated in the motion for leave to file this brief attached hereto.

SUMMARY OF ARGUMENT

Major religious organizations in the United States for both religious and secular reasons have taken stands opposing the death sentence. These views reflect the sentiments of half or more of Americans. The basic contention of the prosecution is that despite public sentiment, it is the province of the legislature to fix the penalty for crime, the death penalty so fixed is permissible, and consequently the prosecution is entitled to a jury willing to impose it. We believe there is a decisive response to this contention.

The test question excluding the scrupled juror permeates the trial with prejudice. Before evidence is heard, the jury is led to infer that the prosecution has a powerful case, one warranting death. Thus the *test question, per se,* although applicable only to the question of punishment affects the guilt-innocence determination as well, in a subtle, but powerful fashion.

The *actual exclusion* of the scrupled jurors affects the accused adversely both respecting punishment and the guilt-innocence decision. (pp. 19-20)

With respect to punishment, the defendant has his fate decided by the jury from which those with scruples against the death penalty have been removed. Those who remain are not representative of the population as a whole but differ from the general population with respect to the

relative percentages of men, their occupational status, their income levels and other factors. (pp. 17-19)

Under Illinois procedure, when the case at bar was tried and now, the jury considers simultaneously guilt or innocence and punishment. Thus an accused who claims that he is innocent has no effective opportunity to argue mitigation, for if he did so, his assertion of innocence would be gravely weakened. Thus he has no opportunity to claim that in his particular case the death sentence should not be imposed. (pp. 9-17)

A particularly tragic consequence of the foregoing is that death qualified juries sentence hundreds to a fate that our society in fact does not inflict upon them. But the condemned await months and sometimes years until their fate is finally determined. This tragic plight results from the divergence of belief between the juries we select and society generally. (pp. 17-19)

The death qualified jury moreover passes upon the guilt or innocence question even though the exclusionary rule has no application to this issue. It is a particular prejudice to the accused to have his fate so determined. Decisions regarding the objective facts of a crime are frequently difficult. Hence it is essential that the jury reflect the full range of community thinking. In addition, a decision whether a defendant has been guilty of murder, or some lesser crime, or no crime at all, frequently depends upon the accused's state of mind. (pp. 19-23)

State of mind issues generally. (insanity, reasonable cause, drunkenness (and inability to form a specific intent)) all are delicate issues for which we want a full range of community views expressed on the jury. We must recall that the jury is the sole body authorized to

determine the facts. Although questions of law are subject to appellate review, the facts in general cannot be re-examined, once determined adversely to the defendant.

The exclusionary rule, therefore, both with respect to the guilt or innocence determination and the punishment determination constitute a deprivation of the right to impartial jury under the Sixth Amendment and to due process of law under the Fourteenth Amendment.

ARGUMENT

I.

The Exclusion Rule Deprives the Accused Of a Fair Trial on the Penalty Question.

A. The Crux of the Case.

The crux of the case, in the view of the *amici* is the prosecution contention that it is the prerogative of the legislature to set the punishment for crime. The death sentence is one of the permissible penalties set. The state therefore is entitled to a jury willing to impose this penalty when the state seeks it.

We deem it essential to meet this argument squarely. We urge that the exclusion rule deprives the accused of a fair trial on the question of punishment and on the question of guilt or innocence. Although we discuss these issues separately in this brief, in Parts I and II respectfully, they are closely interrelated. The exclusion rule prejudices the accused from the beginning of the trial, casts a shadow over him during the proceedings, influences the determination of his guilt and affects his punishment.

The expression of our views requires at the outset some observations regarding the views of major religious bodies on capital punishment and the state of public opinion on this subject.

B. Religious stand against the death penalty.

The churches and synagogues of this country, in increasing numbers and in compelling terms have added their voice to those asking our country to desist once and

for all from the deliberate taking of human life by the State.

National bodies of at least 14 denominations have taken a stand against capital punishment.[1]

Of special relevance to the problem before the Court is the breadth of reasons for their stand advanced by religious organizations. They are both religious and secular in character. We make the distinction, but we do so with some hesitation because in the broad sense all of the considerations are religious. We draw a largely arbitrary line however to emphasize that many of the reasons advanced for abolishment of the death penalty have won the acceptance of those not persuaded by "religious" considerations more narrowly defined.

Turning first to the religious considerations, many churches, in varying terms speak of the sacredness of human life. The Church of the Bretheren (A. 5a)[2] puts the matter in precisely these terms referring to the Sixth Commandment. Other denominations express the concept in other language. Thus, the Baptist, (A. 1a) United Church of Christ,[3] (A. 10a) Episcopalians, (A. 7a) American Ethical Union, (A. 2a) Friends (A. 2a) and United Presbyterians (A. 14a) stress the value of human personality. The Episcopalians (A. 7a) and United Synagogue of

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[1] See appendix to brief. In addition, numerous local church bodies have similarly committed themselves. See "What Do the Churches Say on Capital Punishment?" American Friends Service Committee Submission to the World Council of Churches (1961).

[2] All references to "A. ....." refer to the Appendix to this brief bound herewith.

[3] All references to the United Church of Christ are to the Council for Christian Social Action of the United Church of Christ, and are based on its resolution of January 30, 1962.

America (A. 8a) stress that human life is God's to take. The Baptists refer to God's mercy and love.

The Friends (A. 2a) urge that capital punishment is an act of vengeance, not of justice. The Union of American Hebrew Congregations (UAHC) (A. 7a) asserts that the death penalty is not morally justified.

There are broad areas of agreement among the denominations for opposing the supreme penalty on secular grounds. Numerous religious organizations stress that the law should aim at rehabilitation of the offender, rather than at retribution. Churches so declaring include the Baptists, (A. 1a) Christian Churches, (A. 4a) United Church of Christ, (A. 10a) Friends, (A. 2a) Lutherans, (A. 3a) Mennonites, (A. 6a) Methodists, (A. 6a) United Presbyterians, (A. 14a) and Unitarian-Universalists. (A. 9a) The Friends (A. 2a) and Christian Churches (A. 4a) state the matter not only positively but negatively as well: capital punishment promotes vengeance and injustice. Related to this argument is the contention advanced by the Baptists, (A. 1a) United Church of Christ and UAHC that the death penalty has a brutalizing influence upon society. The Christian Churches state that it is unnecessary to protect society. (A. 4a)

One of the traditional arguments in favor of capital punishment is its claimed effect as a deterrent. But the Baptists, UAHC, United Church of Christ, (A. 10a) Central Conference of American Rabbis (CCAR) (A. 8a) Lutherans, (A. 3a) and United Presbyterians (A. 14a) assert there is no proof that it does indeed deter. Several faiths, including the Baptists, (A. 1a) Church of Brethren, (A. 5a) United Church of Christ, (A. 10a) Lutherans, (A. 3a) United Presbyterians, (A. 14a) Unitarian-Universalist, (A. 9a) and Christian Churches (A. 4a) stress the fal-

libility of all human decisions and that an erroneous capital sentence once imposed, is beyond man to correct.

The United Church of Christ (A. 10a) and Christian Churches (A. 4a) asserts that it is the certainty, not the severity of punishment that deters. The death penalty is misleading in that it leads society to believe that it is dealing effectively with a serious problem. Capital punishment is unfair because it falls most heavily on the poor and on minority groups. The United Church of Christ (A. 10a) cite the world trend away from this form of punishment. See Capital Punishment, Developments 1961-1965, United Nations, 1967, p. 5.

The Roman Catholic church, to our knowledge, has not officially expressed its view on the death penalty. But L'Osservatore Romano, (A. 15a) the unofficial organ of the Vatican, commenting editorially on the Caryl Chessman case (October 21, 1959) declared itself opposed to capital punishment, referring specifically to the enormous anguish inflicted on the condemned man while awaiting the outcome of appeals and efforts at commutation.

We do not assert that these are the only arguments against capital punishment. They do represent, however, an impressive array of reasons for abolishment of the death penalty, asserting grounds appealing to Christian and Jew alike. Indeed, they appeal to those who lack formal affiliation with a faith, urging ethical considerations which we hope and indeed believe are widely shared by Americans and by mankind. They have persuaded an increasing number of Americans in recent years and now half the population adopts these views. (See amicus brief of American Civil Liberties Union (ACLU) pp. 13-19).

Despite America's growing repugnance to the death penalty, the prosecution insists upon a jury willing to

impose it. Let us analyze the respective function of the jury and of the judge. Such analysis is important to our argument.

C. Respective roles of judge and jury.

Under Illinois procedure at the time of the trial in the case at bar, the jury, when it once retired, considered first guilt or innocence, and then without a separate hearing on mitigation or aggravation, fixed the penalty. It could impose death, life, or a term of years (not less than 14). (Ill. Rev. Stat., 1959. C. 38. §801).

Although current Illinois law is somewhat different, there is today still no separate hearing on the penalty. The jury determines guilt and then may recommend the death penalty. It has no further role to play in sentencing. If the jury recommends death, the judge may impose death or a term of years (not less than 14). If the jury does not recommend death, the judge may not impose this sentence but only imprisonment. (Ill. Rev. Stat. 1967, C. 38, §§ 1-7 (c) (1) and 9 (1)

In a prior habeas corpus proceedings, the District Court held that due process required an opportunity for petitioner to present evidence in mitigation after the jury had found him guilty. The Court of Appeals reversed. *U.S. ex rel Witherspoon* v. *Ogilvie,* 337 F. 2d. 427 (CA 7th 1964) cert. den. 379 U.S. 950.

The practical consequence of the unitary trial rule in a case where the accused asserts his innocence, is to deprive the accused of an effective right to present evidence in mitigation. If he presents evidence in mitigation before the jury retires he undercuts his claim of innocence. Yet no opportunity is afforded him after the jury determines his guilt.

A final observation: in Illinois as elsewhere, the jury is the sole body authorized to determine the facts. The elaborate opportunities for appellate review offer no occasion for reconsideration of factual questions, except in narrow areas (e.g. where this court itself passes on coerced confession claims).

It is against this background that the issue at bar must be weighted.

D. The prejudicial effect of the exclusion rule.

It scarcely needs authority to assert that a jury out to be broadly representative of the public. The Sixth Amendment itself declares that the jury shall be "impartial". The twelve who sit should be drawn from persons of every race, every creed, every economic class, every stratum of society.

> *Norris v. Alabama,* 294 U.S. 587, 79 L. Ed. 1074, 57 S. Ct. (1935).

Yet the exclusion rule at bar rejects 50% of the population and perhaps more. Its sole justification can be that the exclusion is relevant to the task before the jury. In almost any other situation, a prospective juror who declared that he had conscientious scruples against a possible verdict properly would be held ineligible. But on the question of the death penalty, a special range of factors comes into play.

The death verdict is not simply one among many possible verdicts. It is one awesome to contemplate and irrevocable in result.

The arguments against the death penalty cited above and perhaps others have persuaded half or more of Amer-

ica.[4] Those left to serve on capital juries are those who have considered these arguments and found them wanting, those who on impulse declare themselves lacking scruples against the death penalty, those who have considered them but are unable to make up their mind, and those who have given no thought to the matter. The exclusion rule *assumes* without advancing proof that the class of acceptable prospective jurors and the unacceptable are identical in every respect save their opposition to the death penalty. The assumption itself is questionable and indeed appears unwarranted. Public opinion polls indicate its falsity. There do appear to be significant differences between those with conscientious scruples against capital punishment and those without. Thus, as the ACLU brief points out, pp. 15-16 the group without such scruples and hence jury acceptable differs in important respects from the group with scruples: it contains a larger percentage of men, of white collar workers and of persons in the upper income levels. There may be other elements of difference now unapparent because they have not been searched out.

At an earlier period in our history when the opponents of capital punishment were fewer, then one could contend that the class of the jury eligible was substantially identical with the population generally since the jury eligible (the non-scrupled) included all but a small portion of the citizens. But we can no longer make this assumption when we exclude 50% or even more of those otherwise eligible.

We turn to another facet of the problem. In almost every State, for almost every crime, death is but one of the possible punishments. The jury is given discretion to

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[4] This court has declared "forceful" the arguments against capital punishment on moral grounds and in terms of accomplishing the ends of punishment. *Trop* v. *Dulles*, 356 U.S. 86, 2 L. Ed. 2d. 630, 78 S. Ct. 590 (1958)

impose or to recommend it as it sees fit. Gone, and we trust gone forever, is the rule that the mandatory penalty for murder (or other crime) was death.

If there were but a single punishment for murder, then one might contend that the choice lay between a jury willing to impose death, or an acquittal. Society would be faced with a cruel choice. But it is not. As we have stated, in substantially every state, for substantially every crime, a lesser penalty is authorized. Death is but one of the permissible punishments authorized by law. Society may be protected from the transgressor by a sentence of imprisonment and does not need the extreme sanction for its protection.

Nor is that all. The jury is given power to impose the death sentence but is given no standards for penalty imposition. This being so, we think the accused has a right to a jury which reflects the full range of community thinking on the matter, not only the harsh views, but *all* views. The State may contend that a consequence of our position is that few juries would sentence men to death. Let us take the strongest case against our position and assume this statement is true. If juries are reluctant to return a death verdict it will be a consequence of a decisive shift of public sentiment reflected in the jury room. The State, having authorized death or imprisonment, and having given the jury a voice in the penalty selection without setting standards for its exercise, ought, we submit, to accept the full range of community thought even if a consequence is that the ultimate punishment is seldom imposed.

The Talmud declares that men presumed lacking in compassion were not to be appointed to a court hearing a capital case. (See A. 16a) R. Judah added that one

who was hard-hearted was excluded (Sanhedrin 36b), R. Tarfon and R. Akiba declared that if they had sat on the Sanhedrin no man ever would have been put to death. (Mishnah Makkot, 7a). A court which executed one man in 7 years was declared destructive. To this statement one sage added the commentary that it was destructive if it executed one man in 70 years. These views are relevant to our problem: they show that men learned in a law which permitted capital punishment did not consider themselves barred from sitting as judges and that harsh courts met strong disfavor.

We need not adopt wholly these humanitarian views which weigh the scales on the side of mercy. We ask only that the scales not be weighted against the accused. We ask only that the jury embrace fully all shades of community sentiment. Thus we will avoid the horror of imposing sentences on many which we are prepared to inflict on only a few.

The exclusion rule would be rigorous enough if the accused had a realistic opportunity to present evidence in mitigation. As we have shown, however, he does not, because if he were to do so, he would undermine his defense of innocence (or of guilt of a lesser included offense). The prosecution scarcely needs to present evidence in aggravation, as the crime itself speaks on its behalf in this respect. Similarly, the defense counsel has no effective occasion to argue in mitigation, and thus convince the jury that, whatever their beliefs generally may be on capital punishment it should not be imposed in the particular instance.

A concluding observation:

The exclusion of scrupled jurors from the panel, in light of our society's deep reluctance to inflict the death penalty brings in its train another evil scarcely less

horrible than the death penalty itself: the lengthy anguish of the prisoner under sentence while he awaits disposition of his case.

L'Osservatore Romano in the 1959 editorial comment mentioned above, (p. 12. See A. 15a) called attention particularly to the agony of the condemned man. In the United States hundreds endure the agony for months. National Prisoner Statistics, Executions, for 1963-1966 reports the following:

	No. of persons under sentence of death: (End of year)	Elapsed time from sentence to disposition (Those not executed).	Number of persons executed
1963	300	22.4 months	21
1964	315	23.5 months	15
1965	331	33.3 months	7
1966	406	31.7 months	1

Thus the number of persons under sentence continues to rise while the number of persons executed declines. Those whom we do not execute—whose lives are spared by commutation, declaration of insanity, court reversals etc. are kept waiting months or years to learn their fate. At the end of 1966 it averaged *31.7 months*. There are actually two men who have been under the death sentence since 1953, still unsure of their fate. At the end of 1966 the cases of 15 persons then were pending for 97 months or more.

No doubt the reasons for this situation are complex and are not wholly assignable to any one cause or agency in society. Whatever the reasons may be, in a particular case or generally, underlying them, we believe, is our deep reluctance actually to inflict the death sentence. The exclusion rule is the point of origin for the present ghastly

business because it permits the selection of juries imposing sentences to which society has a manifest aversion. Thus the condemned man suffers a separate punishment not provided for, or contemplated by any law: a lengthy period of indecision as to his ultimate fate.

The words of Mr. Justice McKenna, said in another connection in *Weems* v. *U.S.*, 217 U.S. 349, 366, 54 L.Ed. 793, 30 S. Ct. 544 (1910) seem specially relevant: "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealth. . . ."

Here relevant is another constitutional principle voiced powerfully by this Court in *Weems*.

Constitutions "are not ephemeral enactments, designed to meet passing occasions. The future is their care and provision for events of good and bad tendencies of which no prophecy can be made." Whatever in the past may have been the justification for the exclusionary rules, that justification today no longer exists. It works powerful evils and ought today to be declared a denial of an "impartial jury" under the Sixth Amendment and of due process under the Fourteenth.

II.

The exclusion rule deprives an accused of a fair trial by an impartial jury on the question of guilt or innocence.

From the outset of the trial the exclusion rule has a subtle but undoubtedly powerful adverse effect, perhaps decisive, upon the accused. The prosecution inquiry regarding scruples against the death penalty cannot be compared to other questions customarily asked to determine juror competence. Most such questions, such as

whether the venireman knows the accused, etc., are emotionally neutral. The question on scruples against capital punishment is not neutral but itself highly prejudicial on the question of guilt or innocence. From the question itself the jury is led to infer at the very beginning of the proceedings, before a word of testimony has been heard, that the prosecution is so utterly convinced of guilt, that it feels justified in asking for the extreme penalty. The defendant thus commences his fight for life burdened with an indefinable shadow cast upon him by the jury "qualification" proceedings.

If this were the defendant's sole burden it would be serious enough. But it is not. The determination of guilt or innocence is a subtle, intricate affair. In the discussion that follows we suppose that murder is the crime since the great bulk of death sentences are imposed for that offense. There are in general two fundamental issues to be considered by the jury. The first is the "objective" question, whether the accused was responsible in a physical sense for the death of the deceased.

The second inquiry relates to the state of mind of the defendant. Not everyone responsible for a homicide commits murder or indeed necessarily commits a criminal offense. It is only, as we used to say, when the accused commits homicide "with malice aforethought" (or its modern equivalent) that murder has been done.

Let us consider the ascertainment of the "objective" facts. This task involves delicate assessment of witness credibility, weighing of testimony against physical circumstances and all the host of critical problems arising in factual determinations. Where the prosecution introduces a confession the jury has before it the especially difficult, indeed almost insoluble task, of determining

among conflicting evidence the circumstances under which the confession was given. Thereafter it must attempt to assess the effect of these circumstances upon the accused. The difficulty and hazard of this undertaking need not be stressed to this Court because this Court itself has struggled with the problem. The lengthy opinions and the number of dissenting and concurring opinions testify to the magnitude of the undertaking.

These are complex undertakings to which we should bring jurors drawn from every segment of the population. Yet the exclusion of jurors with conscientious scruples bars half, or more of the population.

When we turn to the subjective elements involved in a murder prosecution we embark upon an area of even greater difficulty. Consider *Alcorta* v. *Texas*, 355 U.S. 28 (1957). Alcorta admittedly stabbed his wife to death. As this Court said, "He admitted the killing but claimed it occured in a fit of passion when he discovered his wife, whom he had already suspected of marital infidelity, kissing one Castilleja late at night in a parked car. Petitioner relied on Texas statutes which treat killing under the influence of a 'sudden passion arising from an adequate cause . . . as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection' as murder without malice punishable by a maximum sentence of five years imprisonment. . . . The jury, however, found him guilty of murder with malice and, acting under broad statutory authority to determine the extent of punishment, sentenced him to death."

In the actual case this Court reversed the conviction because the prosecution concealed an affair between Castilleja and Mrs. Alcorta. Apart from this aspect of the case there was the question before the jury whether

Alcorta was guilty of murder with or without malice. The difference was between a maximum of death and a maximum of five years[5]

Surely the defendant is entitled to have a jury reflecting every shade of the population to bring their judgment and life experiences to bear upon this crucial question. How else can we best and fairly determine whether there was "an adequate cause" in a "person of ordinary temper," for Alcorta's sudden passion? Conduct deemed innocuous by some elements of society may be deemed passion arousing by others.

The common defense of justifiable use of force (See e.g. Ill. Rev. Stat. (1967) C. 38, Sec. 7-1) likewise demands a jury of diverse elements. Persons raised in a milieu different from that of the accused may put an entirely different interpretation on say a tavern quarrel leading to a death.

Rape cases (and a substantial proportion of death sentences are imposed for rape) present another situation where the widest community thinking should be reflected on the jury. Frequently consent is the defense. On this issue, determinative of innocence or guilt, the evidence is likely to be in utter conflict. Surely a jury truly reflecting the community is best able to judge where truth lies.

Let us simply mention other state of mind issues frequently arising: intoxication (and the ability to form a specific intent) and mental illness. Mental illness no matter how defined, requires determination of a subjective state.

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[5] Illinois today has substantially a comparable hierarchy of punishment for murder, voluntary manslaughter, manslaughter. See Ill. Rev. Stat. (1967) C. 38, Sec. 9-1, 9-2 and 9-3).

Thus we see that the state of mind of the accused often is all important. Depending upon it, the accused may be convicted of a serious or a minor offense or may be acquitted.[6]

We come to the nub of our argument: the death qualified jury is unquestionably drawn from a restricted segment of the population. Excluded from the jury are those persuaded against the death penalty by many of the churches and synagogues of this country and by other humanitarian agencies. These individuals, were they allowed to sit, would bring to the jury valuable human insights and a range of human experience now absent.

CONCLUSION

The exclusion rule has a heavily prejudicial effect both on the punishment question and on the question of guilt or innocence. The exclusion rule comes into play the moment a venireman steps into the box. Every venireman hears the test question put to himself and his fellows. Thus, before a word of evidence has been heard, indeed before the opening statements of counsel, the jurors are led to infer that the prosecution has a powerful case against the accused, one meriting the death penalty. This circumstance alone is undobtedly prejudicial.

The exclusion rule rejects the scrupled juror, leaving available for service only those lacking commitment

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[6] Indeed in past years with unconscious irony, but in light of what we have just said, not without justification, the government used to classify those executed among the accidental deaths. See Statistical Abstract of the United States 1951. Table 75, page 69, footnote 12, for 1900, 1910 and 1920.

against the death penalty. This group, as we have seen, differs significantly from the total population. The defendant has his guilt or innocence determined by this death qualified jury, although the death qualification rule has no application to this aspect of the case. This aspect involves determination of objective facts and subjective states, both difficult matters which peculiarly demand a jury drawn from all segments of the population.

With respect to punishment, the death qualified jury, not representative of the population as a whole, makes a decision on life or death, although a sentence of death is not necessary for the community's protection. It does this without guide from the law and it does it moreover although the defendant has been deprived of real opportunity to present evidence in mitigation or to have his counsel argue mitigation.

The exclusionary rule results in jurors willing to decree for many a sentence society is willing to impose actually upon few. The result is a growing number of condemned men in our prisons waiting for months, indeed years, until their fate is decided.

The rule of law excluding from a jury persons with conscientious scruples against capital punishment is deeply prejudicial to the accused. It is, consequently violative of the accused's right to an impartial jury under the Sixth Amendment, and to due process of law under

the Fourteenth. The amici ask this Court to hold it unconstitutional.

Respectfully submitted,

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APPENDIX

AMERICAN BAPTIST CONVENTION

Statement on Capital Punishment

Adopted: Rochester, New York, June 7, 1960

IV. NATIONAL AFFAIRS, 4. Capital Punishment

1. Because the Christian believes in the inherent worth of human personality and in the unceasing availability of God's mercy, forgiveness, and redemptive power, and
2. Because the Christian wholeheartedly supports the emphasis in modern penology upon the process of creative, redemptive rehabilitation, rather than on punitive and primitive retribution, and
3. Because the deterrent effects of capital punishment are not supported by available evidence, and
4. Because the death penalty tends to brutalize the human spirit and the society which condones it, and
5. Because human agencies of legal justice are fallible, permitting the possibility of the executing of the innocent,

We, therefore, recommend the abolition of capital punishment and the re-evaluation of the parole system relative to such cases.

Recognizing that at present some states (namely, Alaska, Delaware, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island, and Wisconsin) have abolished the practice, we encourage Christians to support groups and agencies working for its abolition in the remaining forty-one states.

AMERICAN ETHICAL UNION

Resolution on Capital Punishment

Adopted at the 53rd National Assembly of the American Ethical Union, April 30, 1960;

Because we believe in the worth of every human personality and are, therefore, opposed to Capital Punishment, we call upon the Congress of the United States to pass legislation repealing it, and to appoint special commissions to study and hold public hearings on this question. We further urge those of our membership who are interested, to work with the committee to advocate the abolition of Capital Punishment.

AMERICAN SOCIETY OF FRIENDS
THE FIVE YEARS MEETING OF FRIENDS

held at Earlham College, Richmond, Indiana, Seventh Month 14-21, 1960:

Capital Punishment

Friends accept the Biblical teachings that every human life is valuable in the sight of God, that man need not remain in his sinful state but can repent and be saved, that God loves the sinner and takes "no pleasure in the death of the wicked", but longs "that the wicked turn from his way and live." (Ezekiel 22:11)

We oppose capital punishment because it violates the gospel we proclaim, and promotes the evils of vengeance and injustice through the agencies of government intended to advance righteousness and justice. We believe the Christian way to deal with crime is to seek the redemption and rehabilitation of the offender, promote penal reform and work more diligently at the task of preventing crime.

As capital punishment is abolished, we recognize that society must be protected against release from prison of those whose unredeemed spiritual life, or whose condition of physical or mental health, would endanger others.

We look with favor upon the renewed efforts in our time to abolish capital punishment, urge our members individually, and our Monthly and Yearly Meetings to unite with others in the task of removing the death penalty from the statute books of the various states, provinces and central or federal governments, and the United Nations.

AUGUSTANA EVANGELICAL LUTHERAN CHURCH OF NORTH AMERICA

STATEMENT ON CAPITAL PUNISHMENT, 1957

Whereas, being motivated by the following consideration:

1. We recognize the right and the duty of society to defend and protect itself against criminals;
2. We recognize the Spirit of Jesus Christ, revealed in the Scriptures, as regulative for conduct in all matters;
3. We believe that the Christian's attitude toward an offender of the law should be redemptive even in the administration of justice!

Be it resolved, that the Church go on record as opposed to capital punishment for the following reasons:

1. In the exercise of its responsibility to safeguard the welfare of society, the State has recourse to alternatives other than punishment by death;

2. Execution terminates the possibility for a redemptive approach to the offender;

3. Execution cancels any possibility of correcting a miscarriage of justice;

4. There is no conclusive evidence that capital punishment serves as a deterrent to the commitment of crime.

CHRISTIAN CHURCHES (DISCIPLES OF CHRIST) INTERNATIONAL CONVENTION

Cleveland, Ohio, October 11-16, 1957

Statement on Capital Punishment

We believe that Christians can no longer justify support of the practice of capital punishment. It has become increasingly clear that the certainty of apprehension and conviction rather than severity of punishment is the real deterrent to crime. Under such circumstances the death sentence becomes not a real protection to society but only a crude form of vengeance or retributive justice. Christian justification of punishment is always found in the hope of the rehabilitation of the offender; since dead people cannot be rehabilitated we can in no way defend capital punishment on Christian grounds.

In a very real sense also the practice of capital punishment stands in the way of more creative, redemptive, and responsible treatment of crime and criminals: There is the danger that society by concentrating attention on the execution of a few criminals may mislead its members into thinking that it is dealing effectively with crime prevention. Christians must insist upon the importance of crime prevention and the rehabilitation of offenders rather than upon retribution.

It should be noted that the protection of society can as well be achieved by the imprisonment of certain classes of criminals as by the death sentence Especially in view of the fact that innocent men have sometimes been mistakenly executed, we must now reject capital punishment as a clumsy, vindictive, and misleading practice that has no place in a Christian or even partially Christian culture. Four states and 27 foreign countries have already outlawed capital punishment. We urge Christians as citizens to work toward the elimination of the death penalty in their own states.

CHURCH OF THE BRETHREN

STATEMENT ON CAPITAL PUNISHMENT

Adopted by 1957 Annual Conference

Because we regard human life as sacred, and because we believe that the sixth commandment has application to organized societies as well as to individuals, we stand ready to give our support to legislation, now proposed in many states, for the abolition of capital punishment.

STATEMENT ON CAPITAL PUNISHMENT

Adopted by 1959 Annual Conference, June 20, 1959

Because the Church of the Brethren holds that the sanctity of human life and personality is a basic Christian principle which the state is also committed to uphold; and because we believe that capital punishment does not really serve the ends of justice, often resulting in tragic and irrevocable miscarriages of justice;

We commend current efforts to abolish capital punishment, and call upon Brethren everywhere to use their influence and their witness against it.

GENERAL CONFERENCE MENNONITE CHURCH
CENTRAL DISTRICT CONFERENCE, GENERAL CONFERENCE MENNONITE CHURCH

April 23-26, 1959 annual session at Goshen, Indiana

STATEMENT ON CAPITAL PUNISHMENT

Be it resolved that the secretary of the conference be instructed to write to the governors of the various states within our conference area where capital punishment is practiced to register our concern that this taking of life be discontinued, and that a redemptive approach be exercised in the treatment of all criminals.

THE METHODIST CHURCH.
Doctrine and Discipline of the
Methodist Church, 1964.

"The Methodist Social
Creed, Par. 1820. p. 661."

"We stand for the application of the redemptive principle in treating law offenders and for study and action directed toward the improvement of laws, correctional facilities and services, and court procedures in order to facilitate rehabilitation. For this reason we deplore capital punishment. We do not believe an individual should be excused for his personal responsibility to society; but we recognize that crime, and in particular juvenile delinquency leading to crime, is often a result of family failure and bad social conditions. Christian citizens and churches have a special opportunity and responsibility for creating those conditions of family life and social surroundings, wholesome recreation, vocational training, personal counselling, and social adjustment by which crime may be reduced, and offenders rehabilitated and redeemed by God's grace."

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA

59th General Convention, Florida, Oct. 16, 1956.

Capital Punishment

Inasmuch, as the individual life is of infinite worth in the sight of Almighty God; and

Whereas, The taking of this human life falls within the providence of Almighty God and not within the right of man therefore be it,

Resolved, That the General Convention goes on record as opposed to capital punishment.

UNION OF AMERICAN HEBREW CONGREGATIONS

Resolution on Capital Punishment

Unanimously adopted by the 45th Biennial General Assembly, Miami Beach, Fla., Nov. 14-19, 1959:

We believe it to be the task of the Jew to bring our great spiritual and ethical heritage to bear upon the moral problems of contemporary society. One such problem, which challenges all who seek to apply God's will in the affairs of men, is the practice of capital punishment. We believe that in the light of modern scientific knowledge and concepts of humanity, the resort to or continuation of capital punishment either by a state or by the national government is no longer morally justifiable.

We believe there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime. We pledge ourselves to join with like-minded Americans in trying to prevent crime by removal of its causes, and to foster modern methods of rehabilitation

of the wrong doer in the spirit of the Jewish tradition of tshuva (repentance).

We believe, further, that the practice of capital punishment serves no practical purpose. Experience in several states and nations has demonstrated that capital punishment is not effective as a deterrent to crime. Moreover, we believe that practice debases our entire penal system and brutalizes the human spirit.

We appeal to our congregants and to our co-religionists, and to all who cherish God's mercy and love to join in efforts to eliminate this practice which lies as a stain upon civilization and our religious conscience.

CENTRAL CONFERENCE OF AMERICAN RABBIS

The annual convention of the Central Conference of American Rabbis, meeting in Chicago, Illinois, June 24-29, 1958, approved the following statement:

The question of capital punishment is now under official study in several states. The Central Conference of American Rabbis urges the abolition of the death penalty where it is still in effect. We are convinced that it does not act as an effective deterrent to crime.

UNITED SYNAGOGUE OF AMERICA

The Executive Council of the United Synagogue of America on March 7, 1960 adopted the following resolution:

Judaism has always regarded capital punishment repugnant to its tradition and to the most noble instincts of man. Even where the Bible prescribes such a punishment Jewish rabbinic and ethical tradition have so interpreted this sanction as to make its application virtually impossible.

Man has been created in God's image, and as such is endowed with sanctity. His life is God-given and his life ends by the grace of God. No man individually or group of men collectively may take the life of another even in what may seem to be just retribution to society for a heinous crime.

The United Synagogue of America believes that the time has come for the abolition of capital punishment from the statute books of all states and provinces and we urge this course upon the various legislatures and the governors of states and provinces where capital punishment is still in force.

UNITARIAN UNIVERSALIST ASSOCIATION
MAY 13, 1961
Boston, Massachusetts

Capital Punishment

WHEREAS: Respect for the value of every human life must be incorporated into our laws if it is to be observed by our people; and

WHEREAS: Modern justice should concern itself with rehabilitation, not retribution; and

WHEREAS: It has not been proved that fear of capital punishment is a deterrent to crime; and

WHEREAS: Human judgments ae not infallible, and no penalty should be used which cannot be revoked in case of error; and

WHEREAS: Capital punishment has not always been used impartially among all economic and racial groups in America;

THEREFORE BE IT RESOLVED: That the Unitarian Universalist Association urges its churches and fellowships in the United States and Canada to exert all reasonable efforts toward the elimination of capital punishment; and

BE IT FURTHER RESOLVED: That copies of this resolution be sent to the Governors of all states in which capital punishment has not yet been eliminated, and to the Canadian Minister of Justice.

COUNCIL FOR CHRISTIAN SOCIAL ACTION, UNITED CHURCH OF CHRIST.

CAPITAL PUNISHMENT

Adopted by the Council for Christian Social Action of the United Church of Christ, January 30, 1962

The Call to Christian Action in Society, adopted by the Second General Synod of the United Church of Christ, meeting at Oberlin in 1959, challenges Christians to pray and work "for better methods in the treatment and rehabilitation of those convicted of offenses against the law." This objective raises a serious question about the practice of capital punishment.

There is a growing trend against the use of capital punishment among states and nations. In this country, the State of Michigan abolished the death penalty in 1847; since then seventeen (See Listing A) other states have taken similar action, although nine (See Listing B) of them, under pressure of anti-abolition sentiment and the impact of the post-World-War-I crime wave, have rescinded their action. Venezuela was the first nation to abolish capital punishment (in 1863); today there are thirty-two other nations which have done the same (See Listing C). In still other countries, and in the United

States, the use of capital punishment has declined even where it has not been legally abolished (See Listing D). In 1960 the number of murders as estimated by the FBI was 9140 (See Footnote 1). In that year there were 57 executions: 45 for murder; 8 for rape; 2 for kidnapping; 1 for forced robbery; 1 for aggravated assault by a life prisoner (See Footnote 2).

The usual arguments offered in support of capital punishment are: (1) that it is a deterrent to crime; (2) that it meets the requirements of justice; and (3) that it protects society against dangerous criminals. Criminologists and penologists increasingly question the validity of these arguments (See Footnote 3).

Capital punishment has not proved the contention that it can deter crime or lower the homicide rate. In general, it is the states which have abolished capital punishment which have the lower homicide rate. For example, in 1948 the highest homicide rate among the states which had abolished capital punishment was in Michigan, whose rate was 3.4 per 100,000; but Ohio, which used the death penalty, had in that same year a homicide rate of 4.5. This relative position between the two states had continued for twenty-two consecutive years (1927-1948). After four years study of the statistics on this subject a British Royal Commission concluded:

> "There is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall." (See Footnote 4).

Students of the American system of justice have also produced evidence that in spite of generally fair adminis-

tration of justice, there are numerous instances in which innocent persons have been executed. It is also clear that the death penalty is more frequently decreed for criminals who are poor than for those who can afford the services of eminent attorneys to defend them. This is especially true of members of minority groups. After witnessing many executions at Sing Sing, Warden Lewis E. Lawes condemned capital punishment because it was discriminatory. A committee of the House of Representatives of the 69th Congress further stated: "As it is now applied, the death penalty is nothing but an arbitrary discrimination against an occasional victim. It cannot even be said that it is reserved as a weapon of retributive justice for the most atrocious criminals. For it is not necessarily the most guilty who suffer it. Almost any criminal with wealth or influence can escape it, but the poor and friendless convict, without means or power to fight his case from court to court or to exert pressure upon the pardoning executive, is the one singled out as a sacrifice to what is little more than a tradition." (See Footnote 5)

It is reported that in the more than 70 murder trials with which the late Jerry Giesler (Hollywood criminal lawyer) was associated no defendant was ever executed, and that his fees were supposed to have run as high as $100,000. (Footnote 6)

A responsible society is built not upon the principle of vengeance or retribution, but upon the conviction that the purpose of the penal process is to protect the community, and, if possible, to rehabilitate the criminal.

Capital punishment has proven ineffective as a deterrent to crime, uncertain as an instrument of justice, and futile as a method of protecting society. The death penalty is obviously the abandonment of any effort to rehabilitate

the criminal. Above and beyond all these considerations, it should be emphasized that the sanctity of the human person and the possibility of redemption are basic to the Christian Gospel. For these reasons the Council for Christian Social Action urges the abolition of capital punishment in all our states and calls upon the churches to encourage more effective forms of justice, looking toward the rehabilitation of offenders and the correction of the ills which contribute to their anti-social behavior. It urges Christians to work for positive programs of crime prevention; elimination of slums; the increase of social services; the constructive treatment of delinquency; the reconstruction of the whole penal system; and the development of the Christian Church as a genuinely redemptive fellowship in modern society.

LISTINGS: [omitted]

FOOTNOTES

1. FBI Uniform Crime Reports—1960.
2. National Prisoner Statistics, Federal Bureau of Prisons, Executions, 1960.
3. Social Action Magazine, April 1961.
4. Report, Royal Commission on Capital Punishment, 1949-1953, page 23.
5. Committee on the District of Columbia, House of Representatives, 69th Congress, First Session, "To Abolish Capital Punishment in the District of Columbia," Reports No. 876, April 14, 1926, page 2.
6. New York Times News Service, January 2, 1962.

THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA

177th General Assembly, 1965

CAPITAL PUNISHMENT

1. Whereas, we believe in the sovereignty of God's grace and in his power to redeem and restore the lost to meaningful and useful life.

2. Whereas, we further believe in the ultimate significance of each individual person as one for whom Christ died.

3. Whereas, several states in this land have recently entered into reconsideration of capital punishment as part of their penal systems.

4. Whereas, we note both the grave and irrevocable nature of execution as punishment and that statistical evidence consistently asserts the failure of the death penalty as a deterrent of crime.

5. Therefore, the 177th General Assembly (1965) reaffirms the action of the 171st General Assembly (1959), and:

a. Declares its opposition to capital punishment.

b. Calls upon the judicatories and members of The United Presbyterian Church in the United States of America to work for the abolition of the death penalty in their respective states.

6. We further call upon the legislatures of those states in which capital punishment is still practiced to hasten to eliminate this punishment from their penal code.

Statement from L'Osservatore Romano—October 21, 1959, repeated February 19, 1960.

N.41 (30.309)—page 2.

On February 19, 1960, L'Osservatore Romano after commenting on the case of Caryl Chessman, which was then nearing its last stages, added the following:—

"On the 21st October ultimo, upon being appraised of the imminent review pertaining to the execution of Caryl Chessman which he requested from the Supreme Court, we then made the following comment:

"We are against the death penalty. We do not overlook the fact that where it exists as in this case there may be a reason to consider its merits especially after such a meticulous appellate procedure by the courts which can last, as it did last for Chessman for a period of eleven years. But it is this anxiety, the lengthy agony of a man, who through a miracle has not become insane that makes this punishment more terrible than death. This in our opinion should invoke in civilized people the most conscientious reflection. A condemned man has waited twelve years for the gas chamber. No one can deny that has expiated any guilt regardless how serious, because a more serious penalty than this does not reasonably exist. Therefore we pose a humane and legal query which has not previously arisen. Even in non Christian times rigid law (summus ius) was declared the highest wrong (summa iniuria). In this last hour, these words no longer apply to the conscientious reflection of a civilized people as those from the United States, where every humane problem has always found sensitive attention which prompted a humane solution. Therefore it no longer remains a juridicial question because it is solely a humane one. It is no longer the legal code of procedure even

though this law allows a pardon. This goes beyond the law itself, and therefore is independent of any legal code. The only appeal now is no longer to that of the magistrates but to the conscience of men; no longer can one resort to appeals because no one can speak against their ultimate decision; the only thing remaining is to recommend a pardon and grant it. The court, which can still decide negatively, the Governor who alone will have to decide, do not have to give any accounting except to that God who alone knows and can administer perfect justice, and who for that reason has always commanded man not to forget mercy, because there can exist on earth justice without mercy, but never should mercy oppose justice. Here mercy in fact weighs heavily on the scales of justice which has a penalty which no law has ever fixed for any crime: that of giving a death penalty to be carried out at an indeterminate time. The court and the governor know that this unheard of punishment has been suffered for a good twelve years.

THE TALMUD[1]

1. Cases involving capital punishment had to be tried before a court of twenty-three qualified members.

2. Trustworthy testimony had to be presented by two qualified *eye-witnesses*. [A man could not be found guilty on his own confession].

3. Circumstantial evidence was not admitted. The Talmud gives the following example: "I saw a man chasing another into a ruin; I ran after him and saw a sword in his hand dripping with the other's blood and the mur-

[1] Selected from Man's Right To Live, Commission on Social Action of Reform Judaism, 1959, pp. 33-36 in consultation with Rabbi David Graubart of Chicago, who contributed also the parenthetical comments.

dered man in his death agony. I said to him, You villain! Who killed this man? Either I or you. But what can I do? Your life is not delivered into my hand, for the law says, at the mouth of two witnesses shall he that is to die be put to death." (Sanhedrin 37b)

4. The testimony of those related by blood or marriage was not admissible.

5. Men who were presumed to be lacking in compassion were not to be appointed to the court of twenty-three. In this regard the Talmud says: "We do not appoint to a Sanhedrin (court)an old man, a eunuch and a childless man." R. Judah adds, "One who is hard-hearted." (Sanhedrin 36b)

6. Witnesses were warned not to testify to anything that was based on their own inference, or that they know only second-hand.

7. Witnesses were interrogated separately about the exact time, place, and persons involved in the crime. If any material discrepancy was discovered in their testimony, the accused was acquitted.

8. Witnesses were asked whether they had warned the accused that he was about to commit a crime for which the penalty was death. Such warning was required. [The accused must have responded that he was fully aware of the deed he was about to do and determined to proceed].

9. The accused was presumed to be innocent until proven guilty, and every reasonable effort was made in the cross-examination to bring out grounds for finding for the accused.

10. In order to prevent witnesses from conspiring to place the guilt on the accused, they were warned that if they testified falsely they would be liable to the same penalty which the accused would suffer if he were convicted on the basis of their testimony.

12. If the accused was found guilty and was being led to the place of execution, there still was a provision on his behalf. As he was led to the place of execution a herald preceded him, calling out his name, his crime, when and where it was committed, and the names of those upon the basis of whose testimony he was condemned. The herald proclaimed that anyone who possesses any evidence favorable to the condemned should hasten to produce it. Should such evidence be forthcoming or should the condemned man declare that he can prove his innocence a stay of execution was granted. If the convict's testimony proved to be ineffective, he was still allowed to make another attempt at proving himself innocent, since two scholars walked along with him for the purpose of judging whether any further testimony that he might offer would justify a delay in execution.

The sentiment against capital punishment is expressed in the Mishnah in an opinion which maintains that a court which executes one man in seven years is a destructive one. R. Eleazar ben Azariah maintained that a court is destructive if it executes one man in seventy years. R. Tarfon and R. Akiba said, "If we had been in the Sanhedrin, no man would ever have been put to death." (Mishnah Makkot 7a)

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON, *Petitioner*,

—v.—

STATE OF ILLINOIS, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 1016

WAYNE DARNELL BUMPERS, *Petitioner*,

—v.—

STATE OF NORTH CAROLINA, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT

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TABLE OF AUTHORITIES

Cases:

Adderly v. Wainwright, M.D. Fla., No. 67-298-Civ.-J. 4-M, 5-M, 12
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Cassell v. Texas, 339 U.S. 282 (1950) 43
Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) 71

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Chevalier v. Beto, U.S.D.C., S.D. Tex., No. 68-H-57 14
Childs v. State, Super. Ct. Buncombe Cty., N.C. 76
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Gebhart v. Belton, 87 A.2d 862 (Del. Ch. 1952) 72
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In the Application of Anderson, Cal. S.C., Crim. No. 11572 ..... 5-M; 13
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Keyishian v. Board of Regents, 385 U.S. 589 (1967) 53

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Nostrand v. Little, 362 U.S. 474 (1960) 76

Oyama v. California, 332 U.S. 663 (1948) 47

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Segura v. Patterson, U.S.D.C., D. Colo. No. 67-C-497 14
Shelton v. Tucker, 364 U.S. 479 (1960) 52
Sheppard v. Maxwell, 384 U.S. 333 (1966) 36
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Smith v. Texas, 311 U.S. 128 (1940) 37, 39, 43, 47
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State v. Bumpers, 270 N.C. 521, 155 S.E.2d 173 (1967) 6, 62, 76
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State v. Funicello, Essex Cty. Ct., N.J., No. 2049-64 14
State v. Garrington, 11 S.D. 178, 76 N.W. 326 (1898) 6
State v. Henry, 196 La. 217, 198 So. 910 (1940) 8
State v. Lee, 91 Iowa 499, 60 N.W. 119 (1894) 6
State v. Riggins, Wash. S.C., No. 39481 15
State v. Rocker, 138 Iowa 653, 116 N.W. 797 (1908) 6
State v. Scott, 243 La. 1, 141 So.2d 389 (1962) 7
State v. Smith, Wash. S.C., No. 39475 15
State v. Weston, 232 La. 766, 95 So.2d 305 (1957) 8
State v. Wilson, 234 Iowa 60, 11 N.W.2d 737 (1943) 6
Stein v. New York, 346 U.S. 156 (1953) 88
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Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 38
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Tuberville v. United States, 303 F.2d 411 (D.C. Cir. 1962) 41
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United States ex rel. Smith v. Nelson, N.C. Cal., No. 48011 13
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W.E.B. DuBois Clubs of America v. Clark, 389 U.S. 309 (1967) 70
Walker v. City of Birmingham, 388 U.S. 307 (1967) 78
Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926) 71
Weems v. United States, 217 U.S. 349 (1910) 27
Wheat v. Washington, U.S., Misc. No. 1301 15

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White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) 38
Whitus v. Georgia, 385 U.S. 545 (1967) 38
Wilkerson v. Utah, 99 U.S. 130 (1878) 27
Williams v. Dutton, 5th Cir., No. 25349 15
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Williams v. Kelly, Super. Ct. Tattnall Cty., Ga. No. 5284 14
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Statutes:

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42 U.S.C. §1981 (1964) 21
Act of April 9, 1866, ch. 31 §1, 14 Stat. 27 21
Enforcement Act of May 31, 1870, ch. 114, §§16, 18, 16 Stat. 140, 144 21
Ill. Rev. Stat., 1959, Ch. 38, §743 2
Md. Code Ann., Art. 51, §8A (1967 Cum. Supp.) 7
Nev. Session Laws, 1967, p. 1472 7
N.C. Gen. Stat. §9-14 (1953 Recomp. Vol.) 6
S.D. Rev. Stat. §34.3618(10) 6

Other Sources:

Adorno, et al., *The Authoritarian Personality* (1950) 61
Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637 (1966) 68
American Law Institute, Model Penal Code, Tent. Draft No. 9 (May 8, 1959) 18

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Annot., *Beliefs Regarding Capital Punishment as Disqualifying Juror in Capital Case for Cause,* 48 A.L.R. 2d 560 (1956) 7, 34

Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action,* 38 Harv. L. Rev. 6 (1924) 68

Christie & Cook, *A Guide to Published Literature Relating to the Authoritarian Personality,* 45 J. Psychol. 171 (1958) 61

Crosson, *An Investigation into Certain Personality Variables Among Capital Trial Jurors, January,* 1966 (unpublished) 59

Frankfurter, *A Note on Advisory Opinions,* 37 Harv. L. Rev. 1002 (1924) 71

Goldberg, *Attitude Toward the Death Penalty and Performance as a Juror* (unpublished) 58

Greenberg, *Social Scientists Take the Stand,* 54 Mich. L. Rev. 953 (1956) 72

Hartung, *Trends in the Use of Capital Punishment,* 284 Annals 8 (1952) 3-M

Impartial Juries, (Austin) Texas Observer, November 27, 1964, p. 5 56

Kalven & Zeisel, *The American Jury* (1966) 60, 64

Karst, Legislative Facts in Constitutional Litigation, 1960 Supreme Court Review 75 68

Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. Pa. L. Rev. 1099 (1953) 7, 31

Louis Harris Survey, The Washington Post, Sunday, July 3, 1966 23

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McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 Pa. Bar Assn. Q. 252 (1959) 7

Note, Jury Selection, 52 Va. L. Rev. 1069 (1966) 38

Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to Courts*, 61 Harv. L. Rev. 692 (1948) 68

Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 Texas L. Rev. 545 (1961) 7, 27, 31, 34, 40, 49, 86

Oberer, *The Death Penalty and Fair Trial*, The Nation, Vol. 198, No. 15, p. 342 (April 6, 1964) 7

President's Commission on Law Enforcement and Administration of Justice, Report, *The Challenge of Crime in a Free Society* 143 (1967) 3-M

Report of the Gallup Poll, Philadelphia Bulletin, Friday, July 1, 1966 23

Shaw & Wright, *Scales for the Measurement of Attitudes* (McGraw-Hill Series in Psychology) (1967) 65

Sidney, *Certain Determinants and Correlates of Authoritarianism*, 49 Genetic Psych. Monographs 187 (1954) 61

UNITED NATIONS, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9) (1962) 31

UNITED NATIONS, Department of Economic and Social Affairs, *Capital Punishment—Developments 1961-1965* (ST/SOA/SD/10) 20 (1967) 3-M, 31

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Weihofen, *The Urge to Punish* (1956) 3-M
Wilson, *Belief in Capital Punishment and Jury Performance* (1964) (unpublished) 56
Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. Crim. L., Crim. & Pol. Sci. 301 (1962) 3-M
Zeisel, *Some Insights into the Operation of Criminal Juries*, (1957) (unpublished) 60, 61, 62

IN THE

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OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

—v.—

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 1016

WAYNE DARNELL BUMPERS,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF THE *AMICI*

Movants N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons assigned also disclose the interest of the *amici*.

(1) Movant N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in matters resulting in decisions that have had a profoundly reformative effect upon the administration of criminal justice.

(2) A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI). This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor.

(3) LDF attorneys have handled many capital cases over the years, particularly matters involving Negro de-

fendants charged with capital offenses in the Southern States. This experience has led us to the view, confirmed by the studies of scholars[1] and more recently by empirical research undertaken under LDF auspices,[2] that the death penalty is administered in the United States in a fashion that makes racial minorities, the deprived and downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death. Our experience has convinced us that this and other injustices are referrable in part to certain common practices in capital trial procedure, which depart alike from the standards of an enlightened administration of criminal justice and from the minimum requirements of fundamental fairness fixed by the Constitution of the United States for proceedings by which human life may be taken. Finally, we have come to appreciate that in the uniquely stressful and often contradictory litigation pressures of capital trials and direct appeals, ordinarily handled by counsel appointed for indigent defendants, many circumstances and conflicts may impede

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[1] E.g., President's Commission on Law Enforcement and Administration of Justice, Report, *The Challenge of Crime in a Free Society* 143 (1967); United Nations, Department of Economic and Social Affairs, Capital Punishment—Developments 1961-1965 (ST/SOA/SD/10) 20 (1967); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956); Hartung, *Trends in the Use of Capital Punishment,* 284 ANNALS 8, 14-17 (1952); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row,* 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962).

[2] A study of the effect of racial factors upon capital sentencing for rape in the Southern States (which virtually alone retain the death penalty for that crime) was undertaken in 1965, with LDF financial support, by Dr. Marvin E. Wolfgang and Professor Anthony G. Amsterdam of the University of Pennsylvania. The nature of the study is described in the memorandum appended to the report of *Moorer* v. *South Carolina,* 368 F.2d 458 (4th Cir. 1966), and in *Matter of Sims and Abrams,* 5th Cir. Nos. 24271-2, decided August 10, 1967. Its results, so far analyzed, show persuasively that the death penalty is discriminatorily applied against Negroes, at least in rape cases. One aspect of these results, limited to the State of Arkansas, was presented in the record in *Maxwell* v. *Bishop,* 385 U.S. 650 (1967).

the presentation of attacks on these unfair and unconstitutional practices;[3] and that in the post-appeal period, such attacks are grievously handicapped by the ubiquitous circumstances that the inmates of the death rows of this Nation are as a class impecunious, mentally deficient, unrepresented and therefore legally helpless in the face of death.[4] Common state practice makes no provision for the furnishing of legal counsel to these men.

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[3] The constitutional challenge made in the present cases to the exclusion of death-scrupled jurors presents one example of the "grisly choice" (*Fay* v. *Noia*, 372 U.S. 391, 440 (1963)) that often confronts counsel in raising these claims. To object to the death-qualification of a jury ordinarily risks insulting the very jurors who will sit in a trial where the defendant's life is at stake. To proffer or present evidence that nonscrupled jurors are prosecution-prone (as we argue *infra*) compounds the insult; and precautions to keep the proffer or the contention from the knowledge of the veniremen are, as a practical matter, likely to be ineffectual. Moreover, the attempt to secure a jury from which scrupled veniremen are not excluded tends to suggest to the jurors who are eventually empanneled that, at best, the defense is trying to hang the jury, and, at worst, the particular case on trial is one in which only a conscientiously scrupled juror would think the death penalty inappropriate.

[4] Recently, in connection with *Adderly* v. *Wainwright*, *infra*, LDF lawyers were authorized by court order to interview all of the condemned men on death row in Florida. The findings of these court-ordered interviews, subsequently reported by counsel to the court, indicated that of 34 men interviewed whose direct appeals had been concluded, 17 were without legal representation (except for purposes of the *Adderly* suit itself, a class action having as one of its purposes to declare their constitutional right to appointment of counsel); 11 others were represented by volunteer lawyers associated with the LDF or ACLU; and in the case of 2 more, the status of legal representation was unascertained. All 34 men (and all other men interviewed on the row) were indigent; the mean intelligence level for the death row population (even as measured by a nonverbal test which substantially overrated mental ability in matters requiring literacy, such as the institution or maintenance of legal proceedings) was below normal; unrepresented men were more mentally retarded than the few who were represented; most of the condemned men were, by occupation, unskilled, farm or industrial laborers; and the mean number of years of schooling for the group was a little over eight years (which does not necessarily indicate eight grades completed).

(4) For these reasons, *amici* LDF and NORI have undertaken a major campaign of litigation attacking on federal constitutional grounds several of the most vicious common practices in the administration of capital criminal procedure, and assailing the death penalty itself as a cruel and unusual punishment. The status of that litigation is described more fully below. Suffice it to say here that LDF and NORI attorneys, with the cooperation of other lawyers, instituted class actions on behalf of the more than fifty condemned men on death row in Florida (*Adderly* v. *Wainwright*, M.D. Fla., No. 67-298-Civ-J) and the more than sixty condemned men on death row in California (*Hill* v. *Nelson*, N.D. Cal., No. 47318; *Application of Anderson*, Cal. S.C., Crim. No. 11572; *Application of Saterfield*, Cal. S.C., Crim. No. 11573), which have resulted in interlocutory class stays of execution for all men under sentences of death in those two States. In addition to the 120 prisoners represented in these class actions, our attorneys have major responsibility for handling forty pending cases of men sentenced to death in ten other States, and are cooperating with, or providing services to, attorneys in half a hundred additional capital cases across the country. Virtually all of these cases are in active litigation; in most of them, stays of execution have been required and were obtained; in the bulk of them (and in the two class actions), the scrupled-juror question now presented is raised; while, in virtually all of the remainder, the question will be raised when procedurally ripe. In summary, we represent or are assisting attorneys who represent, more than half of the 400 men on death row in the United States; and the lives of virtually all of these men will be affected by the Court's decision in the present cases.

(5) In most of our cases in which the scrupled-juror claim is advanced, we have presented it in conjunction with several other federal constitutional contentions, not directly raised in the *Witherspoon* and *Bumpers* cases, but which are so intimately related to the scrupled-juror issue that we believe this Court cannot properly view the latter issue in isolation from them. We develop the pertinent aspects of those relationships (without, however, arguing the related points)[5] in the attached brief. We have also commissioned and are participating directly in the designing of a large-scale empirical investigation, utilizing systematically the methodology of the social sciences, that bears directly on the scrupled-juror question, and which we describe therein. We thus believe that we have information and perspectives, not available to the parties before the Court, which the Court should properly consider in its deliberations upon the issues now before it.

(6) Counsel for the petitioners in *Witherspoon* and *Bumpers* have consented to the filing of a brief *amici curiae* by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent. The present motion is necessitated because counsel for the respondent State of Illinois has refused consent in *Witherspoon*, and because we are advised by counsel for North Carolina that the respondent in *Bumpers* "takes a neutral position and will neither affirmatively oppose nor consent to . . . filing . . . a brief" *amici curiae*.

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[5] Two of these points—the contention that the unfettered, undirected and unreviewable discretion habitually given juries to impose a punishment of life or death violates the rule of law basic to due process; and the contention that the ordinary simultaneous-verdict procedure for capital trials, under which a jury hears at one sitting the questions of guilt and punishment, also offends the Constitution for several related reasons—were presented in some detail in the petition for writ of certiorari in *Maxwell* v. *Bishop*, 385 U.S. 650 (1967) (O.T. 1966, Misc. No. 1025).

WHEREFORE, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

—v.—

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 1016

WAYNE DARNELL BUMPERS,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF *AMICI CURIAE*

Statement

The common question presented by these two cases is whether the widespread state practice of "death-qualifying" a capital trial jury, by excusing for cause veniremen who admit to having conscientious or religious scruples against capital punishment, violates (in general, or in the partic-

ular forms presented here) the Constitution of the United States. That question is one of first impression in the Court.[6] We shall urge that it not be decided on the merits at this time, on these records.

In *Witherspoon*, the Court reviews the denial by the Supreme Court of Illinois of the relief sought in a state collateral attack proceeding against a conviction of murder and sentence of death. Among the claims presented by Witherspoon in his post-conviction petition was the contention that his trial jury was unconstitutionally composed, because the trial court excluded from it persons scrupled against the death penalty. Under the dictates of an Illinois statute in effect at the date of the trial,[7] 47 prospective

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[6] Although one of the several qualifying screens employed to select the blue ribbon jury challenged in *Fay* v. *New York*, 332 U.S. 261 (1947), was the exclusion of death-scrupled jurors, no distinct issue was made in this Court of the validity of such an exclusion. *Fay*, which closely divided the Court on other, tangentially related issues, cannot therefore be thought seriously to address the point. The only other consideration of the question by the Court that we have discovered is a nineteenth century opinion, *Logan* v. *United States*, 144 U.S. 263, 298 (1892). *Logan* sustains the exclusion of scrupled jurors but reverses the conviction there appealed from on other grounds. It is not altogether clear whether this decision, of Conformity Act vintage, states a rule of federal or of Texas practice, particularly since the substantive capital offense charged in *Logan* was assimilated by REV. STAT. §5509 (1875), from Texas law. In any event, no constitutional issue was raised or addressed by the Court, and the disposition of the case on the writ of error was not affected by the Court's discussion of the scrupled juror issue. In *Hardy* v. *United States*, 186 U.S. 224, 227-228 (1902), the question presented related to the form of *voir dire* examination allowed a prosecutor inquiring about scruples. No question of the allowability of a challenge for cause was raised.

[7] ILL. REV. STAT., 1959, Ch. 38, §743: "In trials for murder it shall be a cause for challenge of any juror, who shall on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." This provision, in effect at the time of Witherspoon's trial, was not reenacted in the new Illinois Code of Criminal Procedure effective January 1, 1964; but the practice of death-qualifying a capital jury has been sustained under the new Code, as authorized by the general section providing that each party may challenge jurors for cause. *People* v. *Hobbs*, 35 Ill.2d 263, 220 N.E.2d 469 (1966).

jurors (out of a total of 96 examined on the *voir dire*) were excused at the request of the prosecution or routinely by direction of the court because they were conscientiously opposed to capital punishment. As is usual in such cases, the specific questions asked of the veniremen regarding their attitudes toward the capital penalty, answers to which were treated as requiring their exclusion, varied from venireman to venireman. Most were excused summarily, without further inquiry upon their affirmative response to the question whether they had any conscientious or religious scruples against the infliction of the death penalty, or against its infliction "in a proper case." [8] A few were asked whether they could vote to inflict the death penalty in any case.[9] Some were asked whether they "believed in" the death penalty.[10] A couple were cross-questioned by the court as to whether their profession of scruples was sincere, or whether they "just want to get off the jury." [11] A few other forms of inquiry appear.[12] Only one of the 47 jurors excluded for scruples was asked whether he could return a guilty verdict; and this was an ambiguous question, put to a confused venireman together with other questions on the subject, and apparently not the critical question whose

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[8] See the unprinted record of the *voir dire* proceedings in *Witherspoon* (hereafter, Witherspoon Tr. ——) 661, 662, 668, 686-687, 723-724, 729, 730, 739, 743-745, 752, 788, 806, 807, 823-824, 830, 841-842, 857, 868, 877, 892, 893, 1017, 1018. Approximately three-fifths of the 47 jurors excused for scruples were simply asked whether they had any conscientious or religious scruple against the infliction of the death penalty in a proper case, and answered that they did. Another fifth responded affirmatively to the same question modified by the omission of the words "in a proper case." The remaining fifth of the excluded jurors were asked other or additional questions.

[9] Witherspoon Tr. 685, 714-715, 944, 991.

[10] Witherspoon Tr. 847-848, 856-857, 868; see also *id.*, at 841-842.

[11] Witherspoon Tr. 744-745; see also *id.*, at 685-686, 824, 990-991.

[12] Witherspoon Tr. 644, 685-686, 990-991.

answer resulted in his exclusion.[13] In all, it is fair to say that on the *Witherspoon voir dire*, no inquiry was made by the prosecution or the court to determine whether the direction or strength of a venireman's scruples was such as to preclude his convicting the defendant of murder in a proper case; and only a minority of the excluded jurors were even asked whether their scruples were such as to foreclose their voting for death on the facts of a particular case, if ordered by the court to consider that penalty as one available alternative. In a manner typical of many capital trials (under varying statutory provisions in the several jurisdictions), prospective jurors opposed to capital punishment were simply identified as in some general fashion opposed, and were thereupon expeditiously dispatched. The pattern was set early in the *voir dire* by the judge: "Let's get these conscientious objectors out of the way, without wasting any time on them. Ask him that question first." (Witherspoon Tr. 666; see also *id.*, 661, 668, 687-688, 944). That procedure was generally followed thereafter.

The jury selected by this process convicted Witherspoon and sentenced him to death. His conviction and death sentence were affirmed on appeal, and after some intervening post-conviction litigation, the present petition was filed raising *inter alia* the claim that exclusion of scrupled jurors violated the federal Constitution. The petition was accompanied by an express request to introduce evidence in support of its contentions. The post-conviction trial court *sua sponte* denied this request and dismissed the petition. The Supreme Court of Illinois affirmed, *People* v. *Witherspoon*, 36 Ill. 2d 471, 224 N.E. 2d 259 (1967), relying for rejection of the scrupled-juror contention largely on its recent decision in *People* v. *Hobbs*, 35 Ill. 2d 263, 220 N.E. 2d 469 (1966), a case coming to that court on direct appeal from a

[13] Witherspoon Tr. 642-644.

murder conviction in which the death penalty had not been imposed.

Bumpers brings here for review a judgment of the Supreme Court of North Carolina affirming on direct appeal convictions of Bumpers on a bill of indictment for rape (a capital charge) and two bills for assault with intent to kill. Pursuant to the jury's recommendation of mercy, Bumpers was sentenced to life imprisonment on the rape conviction; consecutive ten-year terms were imposed on each conviction of assault. In the process of selecting the trial jury, 53 veniremen were interrogated; 16 were excused on the prosecution's challenge for cause because of opposition to capital punishment, including 3 of the 6 Negro veniremen.[14] Defense counsel was allowed by the court a blanket objection on federal constitutional grounds to this death-qualification procedure.[15] As in *Witherspoon*, the disqualifying questions asked the several veniremen varied but none touched on the prospective jurors' ability or willingness to bring in a guilty verdict. Several of those excused asserted that they could not vote for the death penalty under any circumstances.[16] Several admitted that they did not believe in capital punishment under any circumstances.[17] One said only that he did not believe in capital punishment.[18] Another admitted that he had conscientious or religious scruples against the death penalty.[19] One juror said that he would not want to give

[14] Bumpers R. 71-72. Bumpers is a Negro charged with rape of a white woman and assaults upon the woman and her white escort. The remaining three Negro veniremen were also excused, one for cause and two on the prosecutor's peremptory challenges.

[15] Bumpers R. 14 (stating the ground of objection), 16 (allowing the general objection).

[16] Bumpers R. 13-14, 15, 18-19; cf. *id.* at 16, 17.

[17] Bumpers R. 17, 19, 20.

[18] Bumpers R. 19.

[19] Bumpers R. 16.

consideration to the death penalty as a possible verdict, but that he would consider it if the judge told him that he was required to; he would obey the court. The judge then asked him "Do you believe in capital punishment"; he answered no; and he was excused.[20] A final juror testified that he believed in capital punishment, but not for rape; that he would not therefore consider a verdict of guilty as charged (i.e., without recommendation of mercy) in this rape case. The judge asked: "You do not believe in capital punishment in rape cases, is that what you said?" The juror replied that that was correct, and was excused.[21] These proceedings were had and excuses allowed, pursuant to a settled North Carolina practice that is, apparently, without express statutory authority.[22] The State Supreme Court sustained its validity in affirming Bumpers' convictions, *State* v. *Bumpers*, 270 N.C. 521, 155 S.E.2d 173 (1967), in reliance upon a recent decision to the same effect in an appeal of a case wherein the death penalty had been imposed, *State* v. *Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967).

The death-qualification procedures disclosed by these two records are exemplifications of a practice, common in its general forms but varying widely in the details of its execution, from jurisdiction to jurisdiction. The exclusion of scrupled jurors from capital juries is forbidden by judicial decision in one state,[23] and by recent statutory enactments

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[20] Bumpers R. 15.

[21] Bumpers R. 19.

[22] The only applicable North Carolina statute appears to be N.C. GEN. STAT. §9-14 (1953 Recomp. Vol.), preserving in general terms "the usual challenges in law to . . . any juror," and providing that the judge shall "decide all questions as to the competency of jurors."

[23] *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State* v. *Rocker*, 138 Iowa 653, 116 N.W. 797 (1908); *State* v. *Wilson*, 234 Iowa 60, 11 N.W.2d 737 (1943). In *State* v. *Garrington*, 11 S.D. 178, 76 N.W. 326 (1898), the South Dakota Supreme Court also held the excuse of scrupled jurors improper, but subsequent legislation allowed it. S.D. Rev. Stat. §34.3618(10).

in two more;[24] elsewhere in this country, it is practiced in varying forms under statutory provisions or common-law criminal procedure.[25] It appears not to be practiced in England (prior to the advent of abolition),[26] in Canada, or in other common-law jurisdictions.

The questions asked veniremen to determine the state of their conscientious or religious attitudes toward capital punishment, and the precise grounds of disqualification for scruples, vary widely. From State to State, from court to court, from judge to judge, from case to case, and even from venireman to venireman on a particular *voir dire* (as in *Witherspoon* and *Bumpers*), interrogation of the veniremen may be more or less protracted and intensive; and excuses are allowed on answers ranging from a flat assertion that the juror would never convict on any state of facts in a case where the death penalty is possible, to a generally expressed opposition to capital punishment, or approval of its legislative repeal, or a statement that only in an extreme case would the juror impose the penalty of death.[27] Cases with which we are

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[24] Md. Code Ann., Art. 51, §8A (1967 Cum. Supp.); 1967 Nev. Session Laws p. 1472, repealing former Nev. Rev. Stat. §175.105(9).

[25] See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1105-1107 (1953); Annot., *Beliefs Regarding Capital Punishment as Disqualifying Juror in Capital Case for Cause*, 48 A.L.R.2d 560 (1956). The practice is criticized in Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt*, 39 Texas L. Rev. 545 (1961) [hereafter cited as Oberer]; Oberer, *The Death Penalty and Fair Trial*, The Nation, vol. 198, No. 15, p. 342 (April 6, 1964); McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 Pa. Bar Assn. Q. 252 (1959).

[26] Oberer, at 566, 7, n. 92.

[27] See, for example, the excerpts of *voir dire* in the *Arguello* case, set forth in Appendix I *infra*. See also, e.g., *State* v. *Scott*, 243 La. 1, 141 So.2d 389, 394 (1962) (sustaining exclusion of a juror whose expressed attitude was "that the offense would have to be 'pretty serious' for

familair show a great variety in the level of concern of the *voir dire* procedure with the question of conscientious scruples. In many instances, the presiding judge routinely and without much inquiry identifies veniremen who say that they oppose capital punishment, or whom the judge believes have some reason for opposing it, and excuses them summarily. (We know of one capital case, for example, in which a prospective juror was excused simply because he was a Quaker.)[28] In other proceedings, hours of questioning are devoted to the jurors' attitudes toward capital punishment. Lengthy and elaborate interrogation of the veniremen is pursued, whose effect is to leave with the jurors the intense impression that conscientious scruples and attendant attitudes of mercy and compassion are unlawful, irrational, and the fit subject of judicial condemnation. (We are aware, for example, of an instance in which a prospective juror who reacted to a protracted death-qualifying *voir dire* by volunteering that she had two sons of her own, and, thinking that it might be one of them on trial, might favor the defense, was excused from jury service generally—not merely in the capital case being tried—for the announced reason that she was emotional, hence unfit for jury service).[29]

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him to bring in a verdict assessing the death penalty . . ."). Compare *State* v. *Weston*, 232 La. 766, 95 So.2d 305 (1957) (sustaining the *inclusion* of a juror whose expressed attitude was that he would always impose the death penalty except where the evidence was pretty weak). Some jurisdictions that allow the exclusion of jurors scrupled against capital punishment also excuse for cause jurors scrupled *in favor* of the death penalty. E.g., *State* v. *Henry*, 196 La. 217, 198 So. 910 (1940). Others do not. *E.g.*, *Rollins* v. *State*, 148 So.2d 274 (Fla. 1963); see *Poole* v. *State*, 194 So.2d 903 (Fla. 1967).

[28] See the excerpt of *voir dire* examination in the *Saterfield* case, set forth in Appendix II, *infra*.

[29] See the excerpt of *voir dire* examination in the *Schader* case, set forth in Appendix III, *infra*.

We have gone outside the records of *Witherspoon* and *Bumpers* for this brief description of the general institution of death-qualification of capital juries, as it is practiced in the several States today, because the Court's decision in these cases may affect the institution more or less broadly, and it seems advisable that the nature of that somewhat amorphous institution, in its general outlines, be stated.

Summary of Argument

We urge that the Court not now decide on the merits the ultimate constitutional question posed in these two cases: whether death-qualifying a capital jury violates the Constitution of the United States. The *Witherspoon* case should be reversed and remanded with directions to afford Witherspoon the evidentiary hearing which his post-conviction petition sought in order to substantiate that federal constitutional claim. This may and should be done without deciding the substantive validity of the claim, since one of the purposes for which Witherspoon sought a hearing was to make a record of constitutional facts—as distinguished from adjudicative facts—facts whose very function is to support an advised and well-considered determination of the merits of the constitutional question to which they relate. The scrupled-juror issue need not and ought not be reached in *Bumpers*, since Bumpers has a palpably valid search-and-seizure claim that is included within the grant of *certiorari* to the Supreme Court of North Carolina; but, if it is reached, *Bumpers* should fitly be remanded to that court in light of the reversal of *Witherspoon*.

Our reasons for urging deferment of decision upon the constitutional objections here presented to the practice

of excluding death-scrupled jurors from capital juries are several. First, the scrupled-juror question is one of vital importance—literally a question of life or death—to hundreds of condemned men on whose behalf proceedings raising the point are already pending in a number of courts. Those proceedings present the scrupled-juror question in the context of several other substantial federal constitutional contentions, not brought here in *Witherspoon* and *Bumpers,* which are so functionally related to the scrupled-juror issue that decision of the latter without consideration of them would be exceedingly ill-advised. Second, the nature of the scrupled-juror issue itself is such that an adequate factual record, not presented to the Court by either of these cases in their present posture, is the indispensable condition of its wise and deliberate decision. More even than most constitutional issues, the claim that due process and equal protection are violated by the exclusion of death-scrupled jurors implicates questions of constitutional fact which the Court cannot properly resolve by intuition or speculation, and whose development on the record of an evidentiary hearing is essential to informed and enlightened determination of this difficult, important constitutional point.

Those factual questions are of a sort that lend themselves to systematic investigation by the methodology of social science research; and, indeed, a major empirical study of them has already been undertaken whose results can be judicially presented in a fashion that will illuminate the ultimate constitutional judgments required to be made. Since Witherspoon was wrongly denied an evidentiary hearing at which this sort of presentation could be developed, proper principles for the adjudication of grave constitutional controversies require the reversal and re-

mandment of his case. The same principles preclude unnecessary and precipitous disposition of the issue in *Bumpers*, which is properly reversible on another ground. If, however, the scrupled-juror point is reached in *Bumpers*, that case should be remanded without definitive decision of the constitutional merits because of (i) unclarity of the record stemming from the ambiguous treatment so far given by the North Carolina Supreme Court to matters of the sort that will be heard after remand in *Witherspoon* and (ii) the desirability of affording the North Carolina court an opportunity for determination in the first instance of the issues presented here, cf. *Patterson* v. *Alabama*, 294 U.S. 600 (1934).

ARGUMENT

I.

This Court Should Not Decide the Scrupled-Juror Issue in Isolation From Other Related, Substantial Federal Constitutional Challenges to Capital Trial Proceedings.

A. *The Scrupled-Juror Issue in Context.*

As we have indicated in our motion for leave to file this Brief, pp. 1-M–6-M, *supra,* we are now representing a substantial number of the condemned men in this country. On their behalf, we have raised a set of interrelated federal constitutional challenges to capital punishment and to its common procedural incidents which several courts, including this Court, have recognized as substantial.[30]

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[30] The following litigations are noteworthy, although the enumeration is not exhaustive:

(i) *Adderly* v. *Wainwright,* U.S.D.C., M.D. Fla., No. 67-298-Civ-J is a class action habeas corpus proceeding on behalf of the 50 inmates of Florida's death row, challenging the administration of capital punishment in that State on the first four grounds stated at pp. 20-21, *infra.* (For purposes of this footnote, those grounds may be abbreviated as: (1) exclusion of scrupled jurors; (2) lawlessly broad jury discretion; (3) unconstitutional single-verdict procedure; (4) cruel and unusual punishment. The fifth ground described at p. 21, *infra*—racial discrimination in capital sentencing—is not presented in *Adderly,* but is raised in another habeas corpus case in the same court, *Craig* v. *Wainwright,* U.S.D.C., M.D. Fla., No. 66-595-Civ-J, pending.) In an order of April 13, 1967, in the *Adderly* case, United States District Judge William A. McRae, Jr. stayed all executions in the State of Florida, reciting that "it is apparent on the face of the Petition that if petitioners' allegations are true, their constitutional rights may have been violated . . . [A]side from the procedural aspects of the case [involving the propriety of a class action for a writ of habeas corpus], the petition, taken as a whole, may state a claim for relief by way of federal habeas corpus." (Order of April 13, 1967, pp. 1-2.) By order of August 9, 1967, Judge McRae subsequently continued his class action stay in effect. (*footnote continued on next page*)

The *Witherspoon* and *Bumpers* cases present one of those

(ii) *Hill* v. *Nelson*, U.S.D.C., N.D. Cal., No. 47318, is a similar class action habeas corpus proceeding on behalf of California's 60 condemned men. It raises the same claims as *Adderly*, with the exception of the single-verdict contention. (California has a split-verdict procedure for capital trials in murder cases.) By order of July 5, 1967, District Judge Robert F. Peckham stayed all executions in California for which dates had been or would be set. The Attorney General of the State sought by a petition for mandamus and prohibition to have the Court of Appeals for the Ninth Circuit set aside Judge Peckham's stay. The Court of Appeals declined, after argument, to do so. *Nelson* v. *Peckham*, 9th Cir. No. 21969, decided July 10, 1967.

Thereafter, Judge Peckham determined that considerations of convenience were persuasive against entertaining the *Hill* v. *Nelson* case as a class action. By order of August 24, 1967, he therefore vacated the class stay, but kept the stay in effect as to the individual *Hill* petitioners. Exercising the authority of a federal habeas corpus court to "dispose of the matter as law and justice require," 28 U.S.C. §2243 (1964), he established a procedure for the filing of individual federal habeas corpus petitions by the other death-sentenced California prisoners, for their consolidation, and for stays of execution of the individual petitioners. "Justice requires that no condemned man who has standing to raise any federal constitutional issue, including any of the four common questions [i.e., cruel and unusual punishment; lawlessly broad jury discretion; exclusion of scrupled jurors; and a fourth claim—right to appointment of counsel in the post-appeal stages of a capital case] should be executed until such question is finally adjudicated." (Order of August 24, p. 8).

(iii) *United States ex rel. Smith* v. *Nelson*, U.S.D.C., N.D. Cal. No. 48011, is an individual habeas corpus action raising the same issues as *Hill* v. *Nelson*. The petition was denied on the merits by District Judge William T. Sweigert on October 20, 1967. Judge Sweigert found the issues presented substantial and accordingly granted a certificate of probable cause and a stay of execution pending appeal. Thereupon, on Smith's motion in the appeal, the Court of Appeals for the Ninth Circuit vacated Judge Sweigert's Order denying the petition and remanded the case to the District Court to await further developments in the California Supreme Court cases described in the following subparagraph. *Smith* v. *Nelson*, 9th Cir., No. 22328, Order of January 3, 1968.

(iv) In the *Hill* v. *Nelson* order of August 24, Judge Peckham found that several of the federal issues raised therein had not been presented to the California courts. He therefore required the individual *Hill* petitioners to exhaust their state remedies, while the federal stay of execution remained in effect. Habeas corpus petitions raising the four *Hill* questions were filed in the California Supreme Court by two of the *Hill* petitioners. By order of November 14, 1967, that court *sua sponte* entered orders in *Application of Saterfield* Cal. S.C., Crim. No. 11573, and *Application of Anderson*, Cal. S.C., Crim. No. 11572, staying all

challenges, isolated by the fortuities of litigation from the others.[31]

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executions of condemned men in the State of California until the issues were resolved.

(v) The United States Court of Appeals for the Fifth Circuit has recently stayed executions of individual federal habeas corpus petitioners in cases challenging the administration of the death penalty in three States within that Circuit. *Spencer* v. *Beto,* 5th Cir. No. 25548, Order of November 16, 1967 (Texas); *Brent* v. *White,* 5th Cir. No. 25496, Order of November 28, 1967 (Louisiana); *Shinall* v. *Breazeale,* 5th Cir. Misc. No. 978, Order of February 21, 1968 (Mississippi). Each of these cases raises the four *Adderly* issues; *Brent* and *Shinall* also raise claims of racial discrimination in capital sentencing and of systematic exclusion of Negroes from the capital trial juries.

(vi) Stays of execution of condemned men have been issued by numerous federal district courts and state trial courts in post-conviction proceedings raising the *Adderly* issues together with, in some cases, the contention of racial discrimination in capital sentencing. E.g., *Bell* v. *Patterson,* U.S.D.C., D. Colo., No. 67-C-458, Order of September 14, 1967; *Segura* v. *Patterson,* U.S.D.C., D. Colo., No. 67-C-497, Order of October 13, 1967; *Brown* v. *Lane,* U.S.D.C., N.D. Ind., No. 4129, Order of December 29, 1967; *Childs* v. *Turner,* U.S.D.C., W.D.N.C., No. 2663, Order of May 12, 1967; *Chevallier* v. *Beto,* U.S.D.C., S.D. Tex., No. 68-H-57, Order of January 24, 1968; *Arkwright* v. *Kelly,* Super. Ct., Tattnall Cty., Ga., No. 5283, Order of December 1, 1967; *Williams* v. *Kelly,* Super. Ct. Tattnall Cty., Ga., No. 5284, Order of December 1, 1967; *State* v. *Funicello,* Essex Cty. Ct., N.J., Indictment No. 2049-64, Order of February 23, 1968.

(vii) *Maxwell* v. *Bishop,* 385 U.S. 650 (1967), is a habeas corpus proceeding by a condemned Arkansas prisoner, challenging his sentence of death on the grounds of lawlessly broad jury discretion, racial discrimination in capital sentencing, and unconstitutional single-verdict procedure. His petition also raised a claim of systematic exclusion of Negroes from Arkansas juries that had been decided against him on the merits in a prior federal habeas proceeding. The district judge declined to entertain the jury claim anew, and decided the several capital punishment issues against Maxwell on the merits. He declined to issue a certificate of probable cause or a stay of execution pending appeal; and a Circuit Judge of the Eighth Circuit also refused a certificate or a stay. Mr. Justice White thereupon stayed Maxwell's execution, and this Court reversed and remanded with directions to grant a certificate and a stay. The case is now under submission in the Court of Appeals for the Eighth Circuit.

[31] This isssue is *sub judice* in numerous other cases, in addition to those noted in the preceding footnote. We are unable to provide an exhaustive

We urge the Court to view this issue in the context of the others. It is not our purpose, in so urging, to expand the constitutional questions presented for consideration beyond the limited ones raised by the grants of *certiorari* here. To the contrary, the thrust of our submission is that the Court should not decide even those limited issues on the merits at this time. But, in order to understand what is at stake in the challenge to exclusion of death-scrupled jurors, and precisely why we contend that decision of the scrupled-juror issue had best be deferred for decision on fuller records than are now before the Court, it is imperative to see the procedures for the trial of capital cases as an inter-connected functioning system, subject—in the totality of their operation—to a number of similarly interconnected, grave federal constitutional complaints. Such a perspective is essential, we suggest, to informed deliberation upon the constitutional implications of the one aspect of that system, the practice of death-qualifying capital juries, now before the Court.

The full range of interrelations among those federal constitutional grievances that arise from the common forms of capital trial practice is not immediately evident. We explore the principal aspects of relationship at pp. 22-28 below, following identification of the substance of the several grievances. But, at one level, the interrelated-

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enumeration, but the following litigations are exemplary of the cases pending at every level of the state and federal court systems: *Wheat* v. *Washington*, U.S., Misc. No. 1301 (petition for certiorari pending); *Ellison* v. *Texas*, U.S., Misc. No. 1311 (same); *Evans* v. *Dutton* and *Williams* v. *Dutton*, 5th Cir., Nos. 25348-25349 (pending for decision of the scrupled-juror question); *Clarke* v. *Grimes*, 374 F.2d 550 (5th Cir. 1967) (execution stayed pending exhaustion of state remedies on the issue); *Crain* v. *Beto*, U.S.D.C., S.D. Tex., No. 66H-626 (pending for decision of the issue); *State* v. *Smith* and *State* v. *Riggins*, Wash. S.C., Nos. 39475, 39481 (pending for decision of the issue); *Siros* v. *State*, Dist. Ct. Harris Cty., Tex., No. 104617 (habeas corpus petition pending for decision of the issue).

ness of the grievances is intuitively obvious. What is at issue in these capital cases is the fundamental question of the fairness and regularity required by the Constitution in proceedings by which the State determines to take human life.

The cases confront squarely both the procedure and the practical consequences of the procedure used to make the legal decision whether a man should live or die. In a capital case tried in most jurisdictions in this country—including Illinois and North Carolina—that procedure consists of death-qualifying a jury by systematically excluding from it persons representative of the most enlightened segment of public opinion, and committing to the jury so selected a wholly arbitrary and unregulated discretion in the life-death choice, to be exercised under conditions that deprive the jurors of information that is the indispensable requisite of rational sentencing judgment.

B. ***A Summary of Capital Trial Procedure.***

Specifically:

(1) On voir dire examination, persons having conscientious or religious scruples against capital punishment are excused for cause. The immediate effects of this practice are several. First, it indirectly achieves what the States are forbidden directly to achieve: the systematic limitation of racial and other minority groups and of women—populations disproportionately characterized by death scruples. Second, it delivers over the administration of justice in trials for the most serious crimes known to our society, bearing the most serious penal exaction that human society can levy upon a defendant, to an unrepresentative sub-group of the community, comprising its most punitive, atavistic and uncompassionate members. Third, in the

process of *voir dire* questioning by which the jury is death-qualified, it reinforces the very attitudes of punitiveness and uncompassion by which the jurors allowed to serve are natively characterized, driving home the message that any *principled*, ideologically-derived determination against the death sentence for the offense on trial is forbidden to the jury, and, indeed, that the attitudes of mercy and compassion which may undergird such a determination are legally disfavored and morally unfit.

(2) The capital case is then tried to the jury so selected, which determines both the question of guilt and that of punishment. Ordinarily, these two determinations are made simultaneously—by the traditional "single-verdict" procedure, as distinguished from the two-staged, "split-verdict" procedure used in a handful of jurisdictions. Under this single-verdict procedure, the jury hears all the evidence bearing on guilt or on punishment *before* retiring to decide the guilt question, then returns with a single verdict which adjudges guilt or innocence and fixes the punishment for guilt at death or something less. There is no separate hearing on the question of sentencing, and no opportunity—other than the guilt trial—to present to the jury evidence of the defendant's character and background, pertinent to the death-life choice. At the guilt trial, the prosecution is usually forbidden to open up, in its case in chief, matters relating to the defendant's character and background. The defendant may open up the character question, subject to rebuttal by prosecution evidence of bad character, damningly prejudicial on the guilt determination. And, of course, the defendant may make an appeal for mercy in sentencing, may personally address those persons who hold

his life in their hands, only by taking the stand generally, thereby waiving the privilege against self-incrimination. This is a practice that, as the Reporters of the A.L.I. Model Penal Code, have noted, forces the defendant to a "choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence."[32] For present purposes, what is important is that a defendant who believes he has any chance of acquittal of a capital charge will often choose to avoid prejudicing that chance by expansion of the trial record into background and character matters that can make him appear guilty; and, under single-verdict procedure, the result frequently is that capital sentencing is done by a jury that knows next to nothing about the person of the defendant, and has not even heard him speak in favor of his life.

(3) But the jury is not merely deprived of factual information that is essential to rational sentencing choice. It is also deprived of any sort of legal standards or guidelines for making that choice. Under ubiquitous capital trial procedure—in Illinois and North Carolina, as in virtually every other American jurisdiction—the decision between the death penalty and lesser alternatives to it is required to be made by the jury in its unguided, unfettered and unreviewable discretion—according to whatever whims or urges may move it. This most momentous of human decisions is unlike any other made by a jury in a purportedly legal proceeding: it is not made pursuant to rules of law or within the limitations of any sort of regular, uni-

[32] AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959), Comment to §201.6, at p. 74.

form or generalized doctrines or principles. Rather it is avowedly *ad hoc, ex post facto* and—because it neither does nor need respond to any rational conception of punishment or sanctioning—wholly arbitrary. Little wonder that, in the actual administration of capital sentencing, jurors have been shown to use this lawless discretion lawlessly, and to discriminate racially, for example, in sentencing men to death.[33]

(4) The jury's sentencing decision is not ordinarily judicially revisable. It is, of course, subject to correction by the exercise of executive clemency; but this sort of gubernatorial dispensation is administered still more irregularly than the jury's decision itself. Procedures for the clemency determination are unformulated; standards to guide it are non-existent; and, by this stage, the condemned man is usually unrepresented and legally helpless.[34] Political and other considerations nevertheless do bring about a substantial number of commutations; and, at the conclusion of the process of a Nation's administration of capital justice for any year, only a few random, arbitrarily selected men are legally put to death. Their executions are as futile and purposeless as they are unusual and arbitrary. For, although it is impossible to speak with dogmatic assurance in such matters, there is simply no evidence that capital punishment serves any legitimate end or purpose of the criminal law—deterrence, incapacitation, reformation—which lesser exactions do not; and the very strong weight of expert opinion condemns the death penalty as utterly without redeeming social value.

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[33] See text and notes at notes 1, 2, *supra*.

[34] See text and note at note 4 *supra*.

C. *The Federal Constitutional Violations Entailed by the Procedure.*

The specific federal constitutional attacks which appear to us to be validly leveled against the various aspects of the procedure just described—and which are raised in most of the litigations described in footnote 30 *supra*—are the following:

(1) The systematic exclusion of death-scrupled jurors in capital cases offends the Constitution because (i) it deprives capital defendants of trial by a jury that is a cross-section of the community, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and (ii) it results in a biased and prosecution-prone jury, unable to accord the defendant a fair trial on the issue of guilt, in violation of the Due Process Clause.

(2) The ubiquitous practice which commits sentencing decision in capital cases to the undirected, unlimited and unreviewable discretion of the jury, permitting jurors to choose between life and death arbitrarily, capriciously, for any reason, or for no reason, violates the rule of law basic to the Due Process Clause, for reasons akin to those that determined *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966).

(3) The single-verdict procedure whereby a trial jury in a capital case simultaneously hears evidence pertinent to guilt and to sentencing, and returns a single verdict speaking to both issues, is constitutionally deficient because (i) it compels the defendant to a choice between his constitutional right of allocution (and to present evidence prerequisite to rational sentencing choice) and his privilege against self-incrimination, and (ii) it results in an unfair trial on either the guilt issue, or the sentencing issue, or both.

(4) Capital punishment is a cruel and unusual punisment within the condemnation of the Eighth Amendment as incorporated into the Fourteenth, at least where (i) the life-death choice is committed to the undirected, unconfined and arbitrary discretion of the sentencer, and (ii) no legal procedures are provided which assure considered and rational judgment by the sentencer of circumstances in mitigation and the absence of circumstances in aggravation that would render imposition of the death sentence cruel and unusual on the facts of particular cases.

(5) In many States, it can be empirically demonstrated that sentencing juries have utilized the unfettered discretion given them in capital sentencing by discriminating racially in the imposition of death sentences. In these States, where there can be shown a long-continued pattern and practice of applying the sentence of death with extremely disproportionate frequency against Negro defendants convicted of offenses (particularly rape) involving white complainants or victims, such Negro defendants are denied the equal protection of the laws guaranteed by Section 1 of the First Civil Rights Act[35] and by the Fourteenth Amendment.[36]

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[35] The Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color, . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Enforcement Act of May 31, 1870, ch. 114, §§16, 18, 16 Stat. 140, 144, implemented the recently adopted Fourteenth Amendment guarantee of equal protection by reenacting the 1866 Act and extending its protection to all persons. This explicit statutory prohibition of racially discriminatory sentencing survives today as REV. STAT. §1977 (1875), 42 U.S.C. §1981 (1964).

[36] The litigations described in footnote 30, *supra*, for the most part, present an additional contention that is less relevant for present pur-

D. *The Interrelatedness of the Constitutional Points.*

It would be inappropriate to argue here, of course, the validity of any of these constitutional contentions, save the scrupled-juror point. However, we think it palpable that each of the several other claims presents, at the least, a grave and substantial federal constitutional objection to the ordinary practices employed in capital cases;[37] and that, in context, these objections cast very considerable constitutional doubt upon the lawfulness of sentences of death obtained pursuant to the practices.

That doubt has an immediate relevance, we believe, to the issue now before the Court. For if, as we have tried to suggest, the institution of capital punishment is fundamentally suspect of inconsistency with the Constitution—if its administration is marked by a cumulation of constitutionally flawed or dubious proeedures—this Court is surely

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poses than those enumerated in text. This is the claim of a constitutional right to appointment of counsel for indigent criminal defendants in capital cases between the termination of their direct appeals from conviction and sentence of death and the time of execution of the sentence by electrocution. The petitioners contend that the failure to provide counsel for condemned indigents during this period is federally unconstitutional (i) under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, because the period is a "critical stage" in a capital case when various life-saving procedures (application for certiorari to the Supreme Court of the United States; state collateral attack proceedings; federal habeas corpus proceedings; applications for executive clemency; proceedings challenging a prisoner's mental competency to be executed; and stays of execution from state and federal courts and other appropriate authorities) are available and require the expert assistance of counsel; (ii) under the Due Process Clause of the Fourteenth Amendment because the assistance of counsel is requisite to assure a fair hearing of post-appellate claims which the indigent condemned man is not adequately able to secure himself; and (iii) under the Equal Protection Clause, because condemned men with money can retain counsel for these various essential functions while indigents cannot. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Douglas* v. *California*, 372 U.S. 353 (1963).

[37] See note 5, *supra*.

advised to come at a question involving the validity of one of those procedures with appreciation of its impact upon and within the entire assailable structure. The Court is surely called upon to question whether, in this context, the immediately challenged practice functions together with other challengeable ones to make up a complex of procedures that is less fair, less regular, less rational, than the Due Process and Equal Protection Clauses of the Constitution can tolerate in proceedings determinative of the lives of men.

Put simply, our submission is that where a penalty as grave, irremediable and apparently purposeless as death is administered by practices many ways constitutionally doubtful, each of the major aspects of that administration must be subjected to the most rigorous scrutiny for consistency with constitutional norms. Certainly is this the case of the practice of death-qualifying jurors, the effect of which is to commit dispositional power over the entire suspect system into the hands of an unrepresentative subgroup of the community—probably a numerical minority[38]—and those who are asserted (provably, we believe)[39] to be atypically punitive, arbitrary, autocratic and unenlightened.

In addition to this general observation, we think it important to call attention to the following more specific points of relationship between the scrupled-juror claim and the other constitutional points we have described:

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[38] Results of nationwide surveys on attitudes towards the death penalty conducted periodically over the past fifteen years have shown growing opposition to the death penalty until, in 1966, the number opposed to capital punishment surpassed the number in favor: 47% opposed, 38% in favor, and the remainder undecided, Louis Harris Survey, The Washington Post, Sunday, July 3, 1966; 47% opposed, 42% in favor, and the remainder undecided, Report of the Gallup Poll, Philadelphia Bulletin, Friday, July 1, 1966, p. 7, col. 6.

[39] See pp. 56-68, *infra*.

(1) The contention that due process is violated by the unfettered discretion habitually given jurors in the death-life choice is intimately linked with the character of the juries produced by the practice of death-qualification. If the nature of the jury's function in capital sentencing is recognized as unique in its commitment of *law-making,* as distinguished from law-applying, power to jurors, then the importance of a jury which is truly representative of the community or general population is intensified. In this context, the constitutional command of representativeness—of a jury that is a "cross-section"—comes to take on additional meaning. Jurors who avowedly determine questions of social policy, as well as of fact, and who are expected to wreak their individual ideologies directly on the defendant, should properly be required to be ideologically representative, as perhaps jurors with a narrower mission need not be.

Conversely, the institution of unfettered jury discretion destroys the major—indeed, the only arguably valid—pretext for the exclusion of scrupled jurors. It is said in defense of their exclusion that a scrupled juror in a capital case—like a juror in a gambling case who avows that he does not believe in and will not enforce the statutes prohibiting gambling—cannot "follow the law." The theory is that the law requires capital jurors to determine the appropriateness of the alternative penalties of death and something-less-than-death on the facts of particular cases. But the truth is—as the argument relating to lawlessly broad jury discretion emphasizes—that the "law" requires nothing of the sort. There are no legal requirements of any sort constricting the capital juror or guiding his choice of penalty; he may consider the facts of the case or ignore them as he chooses; in any event there is no law

to apply to the facts. It is constitutionally disingenuous, at best, to tax a juror with inability to follow the law when there is no applicable law. But *could* this lawless state of affairs be considered a "law" with which conscientious scruples are inconsistent, surely it is critical that that law itself is constitutionally assailable. For if the only state interest asserted as the justification for systematically excluding a class of jurors—thereby *prima facie* destroying the representative or cross-sectional character of the jury—is the obtaining of a jury which will make *ad hoc* penalty decisions in the exercise of a lawless discretion, and if giving jurors that sort of lawless discretion is itself unconstitutional on other grounds, then the justification clearly fails.

(2) The contention that the single-verdict practice employed in capital trials in Illinois, North Carolina and elsewhere is federally unconstitutional also has grave implications for the scrupled-juror contention. This is so in at least two regards. First, one of the grounds of attack on single-verdict procedure is that it functions to deprive the sentencing body, the jury, of information without which the sentencing decision is irrational. Specifically, by limiting the basis for sentencing judgment to the evidence admitted at trial of the issue of guilt or innocence, and by precluding a defendant who stands on his privilege against self-incrimination from personally addressing the sentencing jury, the practice keeps from the jury knowledge of the character and background of the defendant that is essential to rational individualized sentencing. But the exclusion of scrupled jurors has as its expressed purpose and its effect compelling jurors precisely to make individualized sentencing determinations—de-

terminations that are freed from the influence of controlling general principles. The effect of the exclusion, coupled with the single-verdict practice, is therefore, first, to insist upon *ad hoc* death-life sentencing judgments and, then, to deprive *ad hoc* judgments of any non-arbitrary basis.

Second, one head of constitutional objection to the death-qualification of jurors is that the defendant is denied a representative and unbiased jury on the question of guilt or innocence. In defense of the practice, it is said that scrupled jurors are disqualified by their scruples from sitting in judgment on the penalty question in the fashion required by law; and that, since a State may, in the interest of efficiency, choose to try the penalty question simultaneously with the guilt question to the same twelve jurors, the exclusion of scrupled jurors from the guilt determination is permissible. But, quite apart from other difficulties with this argument,[10] it largely collapses if—for reasons other than the scrupled-juror contention—the simultaneous-verdict procedure is itself unconstitutional. A State can hardly justify one practice that impinges on a federal constitutional right by the logic that it is an efficient way to achieve another, independently unconstitutional procedure.

(3) The assault on the death penalty as cruel and unusual punishment also has obvious implications for the question of the constitutionality of excluding scrupled jurors. The exclusionary practice is followed and defended exclusively as a means of permitting the States to conduct capital trials in a certain fashion. If the States are powerless to conduct capital trials in some or all cases, consistently with the Eighth Amend-

[10] See pp. 42-44, *infra*.

ment, the exclusion of scrupled jurors lacks a leg to stand on. But apart from decision of the ultimate Eighth Amendment question on the merits, it is vital to note that subordinate factual issues that have been and will be litigated in cases challenging the death penalty as cruel and unusual are immediately relevant also to enlightened disposition of the scrupled juror point. The leading legal commentator on that latter point has stated one of the principal judgments involved in its resolution to be: "Why, in the qualification of [a capital] . . . jury, should the prosecution's interest as to the punishment issue be given precedence over the defendant's interest as to the guilt issue?" [41] This question, calling for a weighing of countervailing interests, certainly lies at the nub of one method of approach to the issues now before the Court.[42] Its answers would be markedly affected, we suggest, by a showing that the State's interest in the entire institution of capital punishment is insignificant. This showing is a central aspect of the litigation attacking the death penalty on Eighth Amendment grounds.[43]

(4) The claim of racial discrimination in the imposition of the death penalty is also related to the scrupled-juror issue, although less intimately than the other

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[41] Oberer, at 552.

[42] See pp. 33-36, *infra*.

[43] One of the subdivisions of the Eighth Amendment contention advanced in the California litigation described in note 30, *supra*, for example, is that the death penalty is unnecessarily cruel, see *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (Mr. Justice Douglas, concurring); *Weems* v. *United States*, 217 U.S. 349, 370 (1910); *Wilkerson* v. *Utah*, 99 U.S. 130, 136 (1878), because capital punishment serves no significant state interest that can justify its imposition upon the condemned man. In support of that contention, the California claimants have offered and are prepared to prove by expert opinion that there is no legitimate aim of criminal law which is furthered by the death penalty.

constitutional points just enumerated. It is no accident that many of the cases cited in notes 30, 31 *supra*, which present the discriminatory death-sentencing contention involve as well a claim of systematic exclusion of Negroes from the capital trial juries. But we believe it is demonstrable that the exclusion of scrupled jurors and of members of racial and other minority groups are connected phenomena: that such minorities are disproportionately kept from capital jury service by the death-qualification practice.[44] Particularly is this so when persons opposed only to the death penalty for rape are excluded as scrupled; understandably, racially discriminatory application of the penalty would make Negroes so opposed. We make these assertions not as facts which we would ask the Court to notice, but as matters which we believe are provable and which, we think, a properly made record for decision of the scrupled-juror question would and should explore.

E. *Conclusion.*

We have discussed the relations of the scrupled-juror question to these several other constitutional issues for a number of reasons. First, we think that the other issues give considerable support to the constitutional positions of the petitioners in *Witherspoon* and *Bumpers*. The practice of death-qualifying a capital jury posits the existence of certain other institutions and practices—capital punishment, obviously; but also, in some measure, jury discretion in capital sentencing, and the single-verdict capital trial—which are themselves obnoxious to substantial independent constitutional complaint. We would think it inappropriate for the Court to approach the question of constitutionality

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[44] See pp. 58-59, *infra*.

of death-qualification on the usual assumption that those posited underlying institutions are constitutionally unassailable, when in fact they are both assailable and at this very moment being assailed on a broad front. Their susceptibility to that assault increases the trenchancy of the challenge to excluding scrupled jurors, both by pointing up that the exclusionary practice is a constituent part of a more broadly defective set of procedures which render capital trials unfair, and by denying constitutional validity to the several principal defenses and justifications put forward for death-qualification. Advertence of the other issues therefore radically affects the manner in which the determinants of the scrupled juror question must be framed for decision. Conversely, we would hope that nothing would be decided or written by the Court in these cases that would inadvertently reflect upon issues not presented here but closely related to those presented here, and upon which the lives of hundreds of men depend.

Principally, however, we believe that the intimate relation of the scrupled-juror question to other substantial constitutional points strongly supports our own position that the former question should not now be decided on the merits by the Court. It is unfortunate, we believe, that the complaint of exclusion of scrupled jurors has come to the Court in these cases isolated from other claims so closely linked with it. Substantive determination of that constitutional question in isolation would involve one or another of two courses of deliberation by the Court—neither, we submit, satisfactory. The first is to treat as valid and unchallenged several aspects of capital trial procedure affected by, or invoked in support of, the practice of death-qualifying jurors—although those aspects are in fact under massive contemporary judicial challenge which, we believe, will in due course hold them invalid. The second is for this

Court now more or less explicitly to determine those other constitutional points on their merits—without an adequate record and without benefit of briefing or argument. In matters of life and death, both courses would appear most strongly undesirable.

Notwithstanding these considerations, arising from the connection of the issues raised in *Witherspoon* and *Bumpers* with others not now presented, we might hesitate to urge the Court, on that account alone, to defer decision of an issue upon which it had granted *certiorari*. But other substantial reasons appear, in the nature of the scrupled-juror question and the quality of these two records to present it adequately, for pretermitting a decision on the merits now. Finally, we believe that the procedural posture of the *Witherspoon* and *Bumpers* cases strongly supports—if it does not compel—dispositions of these cases without decision of the ultimate constitutional issues raised by death-qualification of capital juries. We turn now to our grounds for these latter assertions.

II.

This Court Should Not Decide the Scrupled-Juror Question on an Inadequate Record.

A. *The Nature of the Legal Issues Presented.*

Our submission, in summary, is that the *Witherspoon* and *Bumpers* records, in their present state, provide a wholly inadequate basis for considered determination of the scrupled-juror issue by this Court. An evidentiary hearing, at which full exploration can be made of important questions of constitutional fact bearing on the issue is, we believe, the necessary precondition of its informed decision. To explain why this is so, we state first our understanding of the nature of the practice of death-

qualifying jurors, and of the nature of the federal constitutional objections to the practice.

1. The Practice of Death-Qualifying Jurors.

The practice of allowing a challenge for cause of veniremen with conscientious scruples against capital punishment stems from the time, in most American jurisdictions, when the death penalty was mandatory upon conviction for capital crimes. Then, the sole function of the jury in a capital case was to determine guilt, the death penalty following automatically. Under a mandatory death-sentencing scheme, it was deemed vital to the interests of justice that jurors disposed against capital punishment be excluded from sitting on the question of guilt, on the theory that such jurors would likely refuse to follow the law and would decline to convict in the teeth of the evidence. During this era, acquittal upon the capital charge was "the only fashion in which [a juror's] . . . opposition to capital punishment could be asserted"; and, with the growth of conscientious opposition in the population, "the possibility of a guilty man going *free* was the vital concern. . . ." Oberer,[45] at 550-551. Accordingly, statutes disqualifying death-scrupled jurors were enacted, and most courts deciding the question without controlling legislation announced a similar common-law doctrine of disqualification. See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa. L. Rev. 1099, 1106 (1953).

Since those times there has occurred an universal humanitarian trend away from capital punishment as a mandatory penalty.[46] American legislatures, with insignif-

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[45] See note 25, *supra*.

[46] See United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9) 11-12 (Ancel, auth., 1962); United Nations, Department of Economic and Social Affairs, Capital Punishment—Developments, 1961-1965 (ST/SOA/SD/10) 9 (1967).

icant exceptions, have provided that in all capital cases the jury (or, more rarely, the presiding judge with the advice or concurrence of the jury) may choose between the alternative penalties of death and imprisonment—usually life imprisonment. See Knowlton, *supra*. The statutory disqualifications of scrupled jurors, however, generally remain and courts have held that the disqualification survives its originating occasion. Thus the present posture of the law is to preserve a rule of practice, which must be justified—if at all, other than as an historical relic—as subserving other purposes than those which it was designed to promote.

At this juncture, it is helpful analytically to distinguish two issues: (a) death-qualification of a jury which sits to decide the question of guilt or innocence; and (b) death-qualification of a jury which sits to decide the question of penalty, that is, of death or imprisonment. Of course, in most jurisdictions, these two issues are treated as one: the same jury decides both questions (usually at a single sitting), and it is death-qualified. But the constitutional justification for the practice—(and we shall show shortly that the practice does require some constitutional justifying)—is quite different for these two aspects of it. Under a capital trial procedure that gives the jury discretion in choosing between the punishments of death and imprisonment upon conviction, exclusion of scrupled jurors from the jury that decides the *penalty* question is justifiable only on the theories: (1) that the legislature intended, by the statute conferring capital sentencing discretion on the jury, to have the death-life decision made by some standard or standards (for example, on an *ad hoc*, "circumstances-of-the-case" basis) inconsistent with conscientious attitudes of opposition to the death penalty (that is, with the maintenance of general principles pursuant to which the decision will be made against death

in some or all classes of cases);[47] *and* (2) that the veniremen excluded for scruples do in fact have such attitudes of opposition as are inconsistent with the legislated standards for the penalty decision.[48] Exclusion of death-scrupled jurors from the *guilt*-determining jury, on the other hand, can be justified only if either (3) the veniremen excluded for scruples have attitudes which unfit them to sit fairly and impartially on the guilt question itself (as was supposedly the case when the death penalty was mandatory); *or* (4) the exclusion of scrupled veniremen from the penalty decision is justifiable (under theories (1) and (2) *supra*), *and* the State has some legitimate interest (of convenience or otherwise) in trying the guilt and penalty questions to the same jury, which interest is sufficient to prevail over the defendant's in having a jury selected without systematic exclusion on the guilt question. We understand state court decisions sustaining death-qualification of jurors against constitutional attack to rest on these four propositions, or some of them.

2. The Theories of Constitutional Objection to the Practice.

The constitutional attacks on the exclusion of scrupled jurors are essentially three-fold:

a. *Denial of a representative jury on the guilt issue.*

First, exclusion of jurors opposing the death penalty denies an accused a trial of the issue of guilt or innocence

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[47] But see pp. 47-50, *infra*. Exclusion of scrupled jurors from the penalty decision might also be justified, in theory, if (1) such jurors were rightly deemed disqualified for some reason on the guilt question, *and* (2) the States had a legitimate interest (of convenience or otherwise) in trying the punishment and guilt issues to the same jury, which interest was sufficient to prevail over the defendant's in having a jury selected without systematic exclusion on the penalty question. We shall discuss the two components of this theoretical justification in the text below, in connection with exclusion of scrupled jurors from the guilt decision; and so we see no need to develop them further here.

[48] But see pp. 44-47, 52-53, *infra*.

by a validly representative jury constituting a cross-section of the community. The practice of systematically excluding from juries the identifiable and substantial group of scrupled persons *eo ipso* destroys the constitutionally requisite representative character of a criminal jury. In addition, it has the effect of working an impermissibly disproportionate exclusion of other groups—principally racial minorities and women—that are characterized by a higher than average incidence of scruples. This exclusion is peculiarly indefensible as it relates to jurors chosen to decide the guilt question, for several reasons. It is arbitrary and unnecessary in this connection, since there can be no justification for exclusion of persons scrupled as to *penalty* from the jury that determines the question of *guilt*. This is the case because the State could readily provide for separate trials on the issues of guilt and punishment, and indeed may well be under an independent constitutional obligation to do so. See p. 20, *supra*. The scope of the exclusion is, in any event, far more sweeping than the broadest justification advanced for it, in that ordinary death-qualification practice excuses scrupled jurors without inquiry into the question of whether the effect of their scruples is such as to make them incapable of sitting as fit and fair triers of guilt. A juror held to be disqualified on the question of punishment is simply routinely treated as disqualified also on that of guilt, without inquiring whether in fact he maintains attitudes and prejudgments which would make him unfit to follow the law if he sat on the guilt question.[49] As a result, a large and ever-growing segment of the community is, without contemporary justification, excluded from jury service in capital trials. As a further result, the administration of

[49] This was the practice followed below in both *Witherspoon* and *Bumpers*. See pp. 2-6, *supra*. It is plainly the prevalent practice in administration of the excuse for cause of scrupled jurors. See pp. 7-8, *supra;* Oberer, at 547-548; *Annot., supra,* note 25, *passim.*

justice in capital cases—fundamentally suspect in any event (see pp. 3-M–4-M, 21, *supra*), and otherwise flawed by numerous arbitrary and irrational procedures (see pp. 17-20, *supra*)—is, in addition, committed into the keeping of an unrepresentative subpart of the community, comprising its most punitive and least enlightened members.

b. *Denial of a representative jury on the penalty issue.*

Second, the exclusion of scrupled jurors, at least in the form presently authorized by the practice of most States, is unconstitutional also as it applies to jurors chosen to decide on punishment. This is so because it denies the accused a trial of the penalty question by a body of jurors validly representative of the community, and because this denial is also arbitrary—that is, it is worked for no other reason than the arbitrary one that some substantial number of jurors on a representative jury would exercise in favor of the accused the sentencing discretion plainly allowed the jury by law. The purported justification for the exclusion—that the state law governing imposition of the death penalty requires an *ad hoc*, individualized exercise of discretion in capital sentencing, with the result that the scrupled juror cannot "obey" or "follow" the law—is entirely spurious. This is a construction of legislative intent that is habitually trotted out for the sole and unique purpose of validating the death-qualification practice; no legislature has ever in fact enacted a policy of mandatory *ad hoc* or *unprincipled* capital sentencing; and, more important, in the actual operation of capital sentencing discretion, jurors are held to no such policy. In any event, the exclusion of scrupled decision-makers cannot be justified as a means of enforcing a regime of *ad hoc* capital sentencing, since such a regime is itself constitutionally impermissible for the double reason that it violates the rule of law (see pp. 18-19, 20, *supra*)

and compels determinations of life and death that are irrational, baseless, and hence arbitrary (see pp. 17-18, 20, *supra*).. Indeed, the discretion allowed a capital jury in sentencing (if it be constitutional at all) provides a practicularly strong reason for insisting that the exclusion of scrupled jurors destroys the jury's representativeness and cross-sectional character, since the free-wheeling ideological function given the jurors puts a premium precisely on ideological representativeness.

c. *Denial of a fair, unbiased jury on the guilt issue.*

Third, the exclusion of scrupled jurors denies the capital accused a fair trial by an unbiased jury on the issue of guilt or innocence. Such a trial is plainly his right under the Due Process Clause, see, e.g. *Irvin* v. *Dowd,* 366 U.S. 717 (1961); *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Turner* v. *Louisiana,* 379 U.S. 466 (1965); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Parker* v. *Gladden,* 385 U.S. 363 (1966), whether or not the Clause is thought to apply to the States the specific Jury-trial guarantee of the Sixth Amendment (see *Duncan* v. *Louisiana,* O.T. 1967 No. 410, pending). But the effect of death-qualifying a panel of jurors is to swear a partial, biased and prosecution-prone jury, composed of those veniremen most likely to ignore the presumption of innocence and to deprive the defendant of the benefit of reasonable doubt on such issues as innocence, guilt of a lesser offense, and sanity.[50] Trial by such a jury is unfair, because the traditions of Anglo-American criminal law stake the assurance of reliable fact-finding and guilt determination precisely upon the judgments of an ordinary range of jurors, not a range narrowed, slanted, skewed by the process of death-qualification.

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[50] The extant empirical support for this proposition is noted at pp. 56-61, *infra.*

3. The Substantiality of the Constitutional Objections.

a. *The right to a representative jury.*

It can hardly be gainsaid that each of these three constitutional objections presented against the institution of the death-qualified jury is palpably substantial. We may begin with the proposition that the defendant in a criminal case is entitled to a jury from which no identifiable class of persons has been arbitrarily excluded, and which thus is "truly representative of the community." *Smith* v. *Texas,* 311 U.S. 128, 130 (1940); see *Labat* v. *Bennett,* 365 F.2d 698, 723 (5th Cir. 1966) (en banc). This is the teaching of constitutional doctrines in which, as the Court of Appeals for the Fifth Circuit recently observed, the precepts of the Equal Protection and Due Process Clauses "merge." *Labat* v. *Bennett, supra,* 365 F.2d at 723. The Equal Protection Clause forbids the arbitrary exclusion from the jury of any class of individuals; the Due Process Clause commands fair procedures which preserve the "integrity of the fact-finding process," *ibid,* and also assures that jury-selection procedures themselves meet rudimentary standards of fairness.[51]

The constitutional command is, at least as a general principle, crystal-clear:

> "There is a constitutional right to a jury drawn from a group which represents a cross-section of the

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[51] Judge Gewin made the point compendiously for the Court of Appeals *en banc* in *Billingsley* v. *Clayton,* 359 F.2d 13, 15-16 (5th Cir. 1966):

> "A just and fair trial by an unbiased, unprejudiced and impartial tribunal is one of the great American constitutional principles. There can be no 'due process' or 'equal protection' unless the principle remains inviolate. . . . There is no expressed constitutional provision as to the classes of persons entitled to render jury service, but the law does require that qualified persons not be excluded from jury service on a class basis. Systematic and purposeful exclusion of qualified persons cannot be reconciled with the American concept of an impartial trial."

> community. . . . Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy, or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people." *Fay* v. *New York*, 332 U.S. 261, 299-300 (1947) (Murphy, J., dissenting).[52]

Thus the Constitution does not permit the State to convict a defendant by the use of a jury from which Negroes are systematically excluded. *E.g., Whitus* v. *Georgia*, 385 U.S. 545 (1967). But this principle is not confined to the exclusion of Negroes; all other arbitrary exclusions—whether directed against Mexicans, *Hernandez* v. *Texas*, 347 U.S. 475 (1954), members of the Catholic faith, *Juarez* v. *State*, 102 Tex. Cr. 297, 277 S.W. 1091 (1925), those who do not believe in a Supreme Being, *Schowgurow* v. *State*, 240 Md. 121, 213 A.2d 475 (1965), women, *White* v. *Crook*, 251 F.Supp. 401 (M.D. Ala. 1966), or members of a particular economic group or class, *Labat* v. *Bennett*, *supra*; cf. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946); *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966) (en banc)—are equally forbidden. It is not inadvertent, we believe, that this Court's leading pronouncement on the question treats racial discrimination in jury selection only as a means and one particular subspecies of the constitutionally condemned practice of confronting a criminal defendant with

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[52] Although Justice Murphy spoke only for the four dissenters, there is no question but that this passage represents the prevailing view of the Constitution. Indeed, even in *Fay* the majority did not dispute this as a statement of principle, concluding only that no showing of improper exclusion had been made. See generally, Note, *Jury Selection*, 52 VA. L. REV. 1069, 1111-1117 (1966). The requirement that the jury be drawn from a cross-section of the community was subsequently recognized by a majority of the Court in *Brown* v. *Allen*, 344 U.S. 443, 474 (1953), and has since been accepted doctrine. See *Labat* v. *Bennett*, *supra*.

an unrepresentative trial jury, the product of any arbitrary or unjustified systematic exclusion:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles." *Smith* v. *Texas*, 311 U.S. 128, 130 (1940).

b. *The unrepresentativeness of a death-qualified jury.*

Tested against these same important principles, the practice of death-qualifying a capital jury is evidently assailable. Prima facie, it appears to be the very thing constitutionally forbidden. It systematically excuses an identifiable group or class of persons whose participation on juries is required in order to make the juries validly representative of the community, and it does so arbitrarily —i.e., without inquiry into whether the persons excused are or are not qualified to sit, except in the sense of the challenged practice itself, which irrationally presumes them unqualified.

That scrupled jurors *are* an identifiable group within the community, and that their characteristics are sufficiently discrete and their numbers sufficiently substantial so that their exclusion renders the remaining veniremen non-representative, are matters which, we shall suggest below, ought to be explored at an evidentiary hearing. But surely these propositions appear intuitively correct. When a State excuses from its juries persons opposed to capital punishment, it is excluding a group who may be assumed

to have in common more than that single, isolated characteristic of opposition.

Philosophical attitudes of that sort do not fortuitously take root in individuals as might a preference for banana ice cream. Rather, common sense suggests that persons who oppose the death penalty share in common other values and attitudes. To catalogue these is a work for scientific study. But, at the simplest experiential level, such people are, obviously, more *humane* than death-qualified jurors. This is a diffuse and unspecific insight, but nonetheless indisputable among persons familiar with the ways of capital trial juries.

Oberer has put the point with practical cogency:

> "Were I to be charged with a capital offense, I should greatly prefer to have the issue of my *guilt or innocence* tried by the first twelve people to pass the courthouse, no questions asked by prosecution *or* defense, than by a jury qualified upon the death sentence. My premise is admittedly argumentative: that a jury qualified on the death penalty is one more apt to *convict*, quite apart from the degree of punishment to be assessed. . . . Of the many people I have discussed this premise with, not one, no matter how capital-punishment oriented, has seen fit to impugn it were *he* the hypothetical defendant."[53]

Oberer's appraisal is certainly shared by prosecutors, who are commonly observed, as a matter of course, to death-qualify the jury in rape and murder cases where they have no intention ultimately to press for the death penalty. And the few extant behavioral studies which are pertinent support the view that scrupled persons tend to be more humanitarian, more tolerant of others' shortcom-

[53] Oberer, at 545-546.

ings, more concerned about questions of "responsibility," more sympathetic to the kinds of defenses that may be made in a capital case, than are those persons who can, as a matter of conscience, justify the imposition of capital punishment. See pp. 56-61, *infra*.

Few would suggest, we suppose, that the State could constitutionally challenge for cause those persons who evince a charitable attitude toward their fellow man; those who take most seriously their responsibility in sitting in judgment upon a fellow creature; those who harbor a healthy skepticism respecting identification witnesses, who accept that police witnesses are fallible; those who are sufficiently concerned and sensitive to perceive subtle distinctions between degrees of homicide. But by challenging scrupled jurors the prosecutor achieves —and ordinarly recognizes himself that he achieves—precisely these results. The consequence of the excuse for scruples appears to be to strip the jury of the more humanitarian, liberal, and objective members of society. Notwithstanding the professed incredulity of some courts on the point[54]— an incredulity that we suggest below might be extirpated or better informed after an evidentiary hearing—it is surely far from surprising to common sense that a juror opposed to the death penalty is also more likely to resolve the question of guilt or innocence fairly in the defendant's favor than a juror qualified on the "eye for an eye" approach.

c. *The asserted justifications for death-qualification.*

But, of course, the exclusion of scrupled jurors is generally asserted to be justifiable on grounds that would not support the systematic exclusion of humanitarian jurors as such. The former exclusion is said to be war-

[54] E.g., *Turberville* v. *United States*, 303 F.2d 411, 420-421 (D.C. Cir. 1962).

ranted and not arbitrary, because it is necessary to serve legitimate interests of the State in capital trials. This superficially plausible assertion deserves scrutiny, first, in connection with the exclusion of death-scrupled jurors from the determination of guilt or innocence.

i. *Exclusion of scrupled jurors from the guilt determination.*

We assume *arguendo* at this point (although we shall question it below) that there exists a legitimate state interest in excluding scrupled jurors from sitting on the penalty question. But, as we have pointed out at p. 33, *supra,* this does not support their exclusion from the jury that decides guilt or innocence, unless it be for one of two reasons: (1) that the State has an interest of convenience, of constitutionally cognizable dimension, in a single-trial procedure by which the same jury sits to decide guilt and penalty; or (2) that veniremen whose attitudes relating to penalty disqualify them on the penalty question (as we are assuming) are thereby unfitted by the same attitudes to sit fairly on the guilt question. Neither of these latter notions appears to survive scrutiny.

As for the notion that such States as Illinois and North Carolina have a constitutionally vested interest in their single-verdict procedure, we have suggested to the contrary at pp. 17-18, 20, *supra,* that such a procedure is, for independent reasons, unconstitutional. Whether or not that view be accepted, it can hardly be denied that the alternative procedure which we believe is constitutionally compelled—the split verdict procedure now employed in several States—is, at the least, a practicable and readily available device for separation of the guilt and penalty questions. Perhaps the single-verdict mode of trial is, to some extent, more economical of time and cost. Perhaps

not.[55] But, however this may be, administrative convenience at this level of significance would not seem to justify a procedure which deprives the criminal defendant, in a capital case, of the basic right to trial by a jury that is a cross-section of the community—a right so fundamental that this Court has identified it with "our basic concepts of a democratic society and a representative government." *Smith* v. *Texas, supra.* We venture to suggest that the convenience of courts and prosecutors has never been thought alone sufficient to justify practices that would otherwise be recognized as clear violations of a constitutional right. It would be far more convenient for jury commissioners to select jurors without going to the trouble of acquainting themselves with members of minority racial groups in the community as required by *Smith, supra,* and by *Cassell* v. *Texas,* 339 U.S. 282 (1950); just as it would be more convenient for the authorities to coerce confessions from arrestees without counsel than to prove them guilty by independent investigation, but see *Miranda* v. *Arizona,* 384 U.S. 436 (1966). If expediency were the criterion, criminal justice could dispense with trials altogether. Rather, the constitutional question is, when practices overshadow fundamental rights of a criminal accused, whether there is sufficient justification for those practices to condone the abridgment of rights which they occasion. See pp. 45-46, 52-53, *infra.* The State's interest in a single-verdict trial does not visibly measure up to snuff by that standard.

This is particularly true inasmuch as the ultimate convenience of the single-verdict practice—having a jury

[55] Experience in split-verdict jurisdictions suggests that the bifurcated trial may indeed be more economical since appellate reversals for trial error relating to penalty questions does not necessitate retrial of the issue of guilt in such jurisdictions. And the time saved by *not* death-qualifying juries in cases where trial of the guilt question fails to result in a verdict of guilty of a capital offense would itself be considerable.

qualified to pass on penalty if and after it convicts—is a contingent convenience that vests only upon the conclusion of the guilt-determining phase of the trial with a verdict of guilty of a capital offense. It would seem bizarre indeed that, where the question of penalty arises only upon a finding of guilt of a capital offense, the right of the accused to a representative jury on the guilt question can be sacrificed to the convenience of a previously death-qualified jury—the need for which follows from a decision of guilt made by the very process in which the State has denied the defendant a representative tribunal.

Exclusion of scrupled jurors from the guilt determination, then, would appear to be supportable only if such jurors are, for some reason, legitimately to be deemed disqualified or unfit to sit on questions of guilt or innocence. It is sometimes urged that they are, because their scruples would preclude their finding guilt in any case where another jury *might* subsequently impose the death penalty. The trouble with this rough-and-ready supposition is that there is nothing to support it as a characterization of the frame of mind or probable behavior of all or any significant portion of the persons whom death-qualification procedure, as ordinarily practiced, excludes.

We pause to point out that, in constitutional matters of this sort, neither unsupported suppositions nor approximative rules of thumb can be made the occasions for denying individual rights. Let it be assumed that a State could exclude from the jury sitting on the guilt question in a capital case persons whose attitudes toward the death penalty are such that they cannot fairly pass on the issue of guilt of the accused. That assumption does not justify the State's making the further assumption that all scrupled persons would function in this fashion, nor does it absolve the State from making the pertinent inquiry into fitness

when it presumes to exclude from juries a substantial group of the community on the theory that they are unfit.

We deal with the right to a fair trial and, in the final analysis, with the most precious and fundamental of human values—life itself. This Court has recently insisted that where fundamental values are concerned, classifications will be closely scrutinized to ensure that they respond to valid state concerns urged as supporting them:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, e.g. *Skinner* v. *Oklahoma,* 316 U.S. 535, 541; *Reynolds* v. *Sims,* 377 U.S. 533, 561-562; *Carrington* v. *Rash,* supra; *Baxstrom* v. *Herold,* 382 U.S. ——, *Cox* v. *Louisiana,* 379 U.S. 536, 580-581 (Black, J., concurring)." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670 (1966).

In *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), to which the *Harper* opinion alludes, the Court struck down a compulsory sterilization law on equal protection grounds where the criteria for sterilization arbitrarily included some individuals and excluded others. The Court, in an opinion to which eight Justices subscribed said:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State

> conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the State[s]. *We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential lest, unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.*" *Id.* at 541. (Emphasis added.)

Under appropriate "strict scrutiny," a practice excluding from the trial of guilt jurors scrupled on the question of penalty would appear to fail considerably. The point is that under ordinary death-qualification procedures—exemplified by both the *Witherspoon* and *Bumpers* records—a venireman is forbidden to sit on the guilt issue if he is opposed to, or does not believe in, or cannot vote for infliction of the death penalty. No inquiry whatever is made whether his scruples have the effect of rendering him unable or unfit to decide fairly and impartially the question of guilt or innocence.

It is bitterly ironic to compare this ordinary practice of excluding scrupled jurors for cause with the common practices of the State courts in criminal trials relating to challenges of jurors for bias. As this Court has seen in many cases coming here on complaints of the denial of a fair trial by reason of prejudicial and inflammatory publicity, jurors who have read or heard about the facts of a case and who, indeed, have prejudged the defendant guilty, are ordinarily permitted to sit, if only they can swear, on the *voir dire*, that they will put their prejudgments out of mind and try the accused on the evidence. E.g., *Irvin* v. *Dowd*, 366 U.S. 717 (1961). Thus, a venireman who has prejudged the case on inadmissible and prejudicial hearsay is allowed to sit

if he has not prejudged it too badly or too firmly; but scrupled jurors are deemed endemically unfit, without the slightest consideration whether their scruples would effect in any manner the course of their deliberations on the guilt question. Yet it is at least as likely, we would suppose, that scruples on the penalty question may leave a juror impartial and fit to decide fairly the question of guilt or innocence, as that prejudgment may.

This callous and uncritical, unrebuttable presumption that an attitude on the penalty question will affect the juror's attitudes on the guilt issue has the hallmarks of constitutional arbitrariness. See, e.g., *Carrington* v. *Rash*, 380 U.S. 89, 93-96 (1965); *Oyama* v. *California*, 332 U.S. 633, 640-642 (1948); *Dombrowski* v. *Pfister*, 380 U.S. 479, 494-496 (1965); *Bailey* v. *Alabama*, 219 U.S. 219, 239 (1911). It would not therefore appear to support the exclusion of jurors with scruples from the guilt-determining jury; and such an exclusion—which both deprives the accused of a jury that is "truly representative of the community," *Smith* v. *Texas, supra*, 311 U.S. at 130, and forces upon him a jury composed of persons whose characteristics tend to impugn "the fairness of the trial," *Labat* v. *Bennett, supra*, 365 F.2d at 723,—seems to us to fall afoul of equal protection and due process alike.

ii. *Exclusion of scrupled jurors from the penalty determination.*

But we may go further. For, as generally practiced, the exclusion of scrupled jurors even from the jury which decides the penalty question itself would violate those same constitutional guarantees.

Such a suggestion may appear at first blush extravagant, since the case for exclusion appears to be firmly supported by the ordinarily acceptable notion that jurors ought not to have a predisposition with regard to the very issues they

are to try. But what this notion—or its application here—overlooks is the peculiar nature of the penalty determination by the jury in a capital case. That determination is such as to render entirely inapposite the kinds of rules which customarily govern jury decision-making, hence the principles which customarily govern juror selection.

Where, as in Illinois, North Carolina, and most American jurisdictions, absolute and unregulated discretion is allowed the jury in its sentencing choice between death and imprisonment, the individual values and ideals of the jurors play an unusually critical role in fixing penalty. It is this characteristic which sets the penalty determination in a capital case apart from all other kinds of jury proceedings. Here the jury is not supposed to determine the facts by impartial, neutral, non-predisposed judgment on the evidence of record—or, rather, that is the smallest part of its function. Here more than in any other situation the jury is expected to reflect the conscience—precisely the predispositions—of the community. To exclude from such a jury what constitutes a sizeable segment of the population unconstitutionally distorts the operation of that collective conscience.

It cannot, therefore, as a realistic matter, be urged in favor of excluding prospective jurors scrupled against capital punishment that the exclusion assures a jury whose members have no fixed or predetermined view with respect to the imposition of the death penalty. All jurors have fixed and predetermined views in this regard; they must have such views; they are expected to; if they did not, the allowance to the jury of complete and unfettered discretion to sentence to death or imprisonment would be an inanity. In fact, the range of individual philosophical attitudes towards capital punishment and other serious moral questions charts a broad spectrum. Even those veniremen

who answer that they could impose capital punishment in the "appropriate case" are "scrupled" against capital punishment in the non-appropriate case. The application of the scrupled-juror exclusion simply has the effect of removing from the jury persons with a *particular kind* of predisposition.

But if the jury is given full discretion in capital sentencing, if it is to act without the benefit of standards, if the State is so little concerned with law in the sentencing decision that it makes the measure of that decision the uninstructed, unregulated and inevitably lawless whimsicality of conscience of particular jurors,[56] how can the State justify the distortion of the collective conscience of the community which is caused by excluding from the jury all of those persons holding the view—which indeed may now be a majority view—that the death penalty ought not to be imposed?[57] It will not do to answer that the State, at least, has a right to determine that the life-death decision will be made on the facts of particular cases. The States generally—and Illinois and North Carolina in particular—have made no such determination; they have simply left their jurors free to ignore the law and the facts

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[56] See pp. 18-20, 24-25, *supra.*

[57] Professor Oberer has eloquently stated the paradox in another connection:

> "[T]he gulf between the community and the death-qualified jury grows as the populace becomes the more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death verdict becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, *to be sworn as a juror in a capital case*—wanes in a particular community, the prejudicial effect of the death-qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication to human charity and understanding." *Oberer,* at 556-57.

in sentencing men to death. Having relegated capital sentencing choice to the regime of the arbitrary, is the State to be permitted to deny a capital defendant a constitutional trial by a jury representative of a cross-section of the community merely because some jurors in the cross-section will make that arbitrary decision according to principle?

We repeat that it is tempting but fallacious to analogize a scrupled juror to a juror who cannot "follow the law" in matters where law governs the jury's decision. We would be quick to admit, of course, that the State may insist upon the exclusion of a juror for example who, at a trial for larceny, concedes that he does not believe in the notion of private property and would never convict one charged with appropriating the property of another. But where there is no law there is no basis for taxing any venireman with potential lawlessness. The juror in a capital case who opposes the death penalty *can* follow the law; he is told to exercise his absolute discretion, and he will do so as well and as surely in accordance with his conscience as the next man.

In short, American capital trial procedure generally is based upon a system of imposing the death penalty which calls for the exercise of an unfettered discretion by jurors. It does not demand their obedience to law and cannot pretend to make any such demand merely as the premise for declaring certain jurors unfit because lawless. The whole sentencing system purports to rely solely on the jury as the conscience of the community. But it distorts that conscience by excluding those who would make the jury reflect the values of the community at large. In so doing, it flouts the guarantees of due process and equal protection in jury composition.

B. *The Importance of Factual Matters to Decision of the Legal Questions.*

We have discussed in the preceding subsection the arguments supporting the constitutional attack upon the practice of death-qualifying capital jurors, not for the purpose of attempting to persuade the Court to assent to them on the merits at this time, but only to demonstrate that they are unquestionably substantial. Their gravity warrants for them, we believe, the most deliberate and informed consideration by the Court, particularly inasmuch as several hundred human lives may depend upon their determination. The problems with the Court's proceeding to definitive decision of the scrupled-juror issue now are basically two. We have already developed in Part I, *supra*, the first of these: the isolation in *Witherspoon* and *Bumpers* of the scrupled-juror claim from other federal constitutional contentions with which the claim is intimately connected and to which, perforce, we have recurred from time to time in our substantive arguments. The second obstacle to decision now is still more fundamental. We believe that the records of these cases are inadequate to inform the Court concerning facts that the Court should know before resolving the ultimate constitutional issues.

We wish to be clear in this regard. We do believe that the Court could properly decide the constitutional questions tendered by the *Witherspoon* and *Bumpers* cases, in favor of the petitioners on the merits, under at least one constitutional approach that depends little or not at all upon factual questions. This approach would involve holding, simply: (1) that scrupled jurors are a discrete class or group, identified and treated as such by the State which singles them out for exclusion; (2) that, regardless of their exact proportions in the population, the members of the excluded group are characterized by a perspective or an

ideology which has gained sufficient historical currency that exclusion of all persons holding to it necessarily results in the selection of juries that are not validly representative of the community, particularly in light of the sort of ideological function that is committed to a capital trial jury; and (3) that no justification for the exclusion of this group of persons, and the consequent unrepresentativeness of death-qualified capital juries appears to be of sufficient weight to warrant subordination of a capital defendant's right to trial by a jury that is a cross-section of the community, inasmuch as (a) excluding jurors who could fairly try the guilt issue from sitting on the determination of guilt or innocence merely because they are deemed to be disqualified on the penalty issue is wholly unjustified, except by what are inconsiderable urgings of administrative convenience said to attend the single-verdict practice; or (b) excluding scrupled jurors as disqualified from sitting on the penalty determination is unjustified, since the attitude of conscientious opposition to the death penalty is not in fact inconsistent with performance of the capital juror's sentencing role as defined by operative state law—even though the state courts may profess that it is inconsistent with the inoperative verbal formulations of the juror's role that are created and employed by the courts only to justify an otherwise unjustifiable exclusion.

The Court could also rule in favor of the respective petitioners on a narrower ground: that in each case one or more of the veniremen was excluded arbitrarily, because (1) in view of the fundamental nature of the right to trial by a jury that is validly representative of the community, a defendant is at the least guaranteed against exclusionary practices that are broader than their purported justifications (see pp. 44-46, *supra;* and cf. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *N.A.A.C.P.* v. *Alabama*,

377 U.S. 288, 307-308 (1964); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 602 (1967)); and, therefore (2) excuse for cause of a professedly scrupled juror is impermissible unless at the least it is established of record that the juror's state of mind is such as to disable him from following the court's instructions with regard to his duty fairly to consider and resolve the issues of guilt and penalty under applicable law. The voir dire inquiries in *Witherspoon* and *Bumpers* fell considerably short of this requirement. See pp. 2-6, *supra*.

Without disparagement of these points, we think that their decision on the merits would be greatly enlightened by their consideration in the context of alternative constitutional formulations, of the sort that we have spelled out at pp. 33-36, *supra*. This course of deliberation would serve to broaden both the Court's comprehension of the death-qualification practice that is constitutionally challenged, and the range of possible constitutional responses to the challenge by the Court. It would illuminate the consequences of the Court's selecting one ground of decision rather than another—consequences that may be considerable both as regards the impact of decision upon the widespread and variegated procedures for excuse of scrupled jurors (see pp. 7-8, *supra*), and also as regards such ancillary questions as retroactivity (see pp. 77-93, *infra*), a literally vital question in this case, with four hundred lives at stake. Deliberation that canvasses all of the related questions seems the more obviously advised since, if the Court declines to adopt the reasoning sketched in the two immediately preceding paragraphs, it cannot in any event dispose of these cases *against* the petitioners without coming to consideration of the full range of their attacks set forth at pp. 33-50, *supra*.

However, these fuller formulations of the constitutional objections to death-qualification, unlike the two theories just presented at pp. 51-53, *supra*, do depend in varying degrees upon factual considerations and factual inquiries which are almost wholly unexplored in the present records.

1. The Pertinent Factual Inquiries.

We venture to suggest that exploration of these factual questions—these matters of "constitutional fact" [58]—will immeasurably assist the Court's consideration and ultimate resolution of the scrupled-juror issue. Much that the Court does not now know about the facts and cannot now learn from the meager available information in the public domain (see pp. 56-61, *infra*) is matter fit for inquiry at an evidentiary hearing. For example, the Court does not now possess any clear and reliable information concerning: (1) what proportion of the population, of the community, is "scrupled" under various possible exclusionary standards (see pp. 23, 34-35, 39, *supra*); (2) to what extent disqualifying scruples are disproportionately found in certain demographic groups—women, Negroes, laborers, members of particular churches or religious denomination, etc.—with the result that death-qualification disproportionately frequently excludes persons in those groups (see pp. 27-28, 34, *supra*); (3) to what extent the class of scrupled persons is characterized by common attributes, attitudes and perspectives other than opposition to capital punishment, and so takes on distinctive in-group identity (see pp. 39-41, *supra*); (4) to what extent these shared attributes, attitudes and perspectives include personality factors that dispose scrupled jurors to greater humanity, compassion, impunitiveness and objectivity than

[58] See pp. 68-74, *infra*.

the class of death-qualified jurors (see pp. 35-36, 40-42, *supra*); (5) to what extent the common characteristics, which differentiate scrupled and non-scrupled jurors as classes, involve intellectual qualities that dispose scrupled jurors to greater attentiveness, responsibility, and capacity for relevant differentiation, as in the grading of offenses (see pp. 40-42, *supra*); (6) to what extent these common characteristics involve attitudes toward crime, courts, corrections and other matters that dispose scrupled jurors to greater impartiality, fairness and rationality in fact-finding and the fixing of penalties (see pp. 40-42, *supra*). Each of these important factual questions relates to an element or elements comprised as an assertion within one of the theories of constitutional objection to the exclusion of scrupled jurors (pp. 33-50, *supra*). But the principal *defenses* or *justifications* of death-qualification equally depend upon factual assertions and propositions concerning which the Court can only speculate on these records; (7) the standards for penalty determinations actually used by death-qualified capital juries (see pp. 32-33, 47-50, *supra*); (8) the extent of the ability of scrupled jurors to lay aside their scruples under direction of the court (see pp. 33, 44-47, *supra*); (9) the extent to which scruples against infliction of the death penalty may influence a juror's determination of the question of guilt or inpocence, in a case in which the juror sits to determine only that question, with the penalty decision committed to other persons (see pp. 33, 44-47, *supra*); (10) the relative practicability and convenience of single-verdict and split-verdict capital trial procedure (see pp. 42-44, *supra*).

Whatever other view or views one may take of the constitutional issues presented by the *Witherspoon* and *Bumpers* cases, we venture to assert that all would likely agree the Court's decision of the issues would be better

informed if made upon a record in which these factual matters were adequately developed.

2. The State of the Record on These Factual Questions.

It is fair to characterize the present records in *Witherspoon* and *Bumpers* as almost totally lacking in the sort of factual information that would assist the Court. In *Witherspoon,* the petitioner's request for an evidentiary hearing on his post-conviction contentions was summarily denied, and he was therefore deprived of the opportunity to make an adequate record. In *Bumpers,* the petitioner put before the Supreme Court of North Carolina summaries of two empirical studies—the Faye Goldberg and Cody Wilson studies described in the next subsection (*Bumpers* R. 73-80)—but the North Carolina court made no findings based upon them, and did not mention them in its opinion. Whether it gave them any consideration at all remains unclear, particularly in light of its reliance upon the previous *Childs* decision, in which no such matter had been presented either at the trial or appellate level.

3. The Present State of the Art on These Factual Questions.

Putting aside the anecdotal and impressionistic views formed of death-qualified juries by experienced criminal lawyers and judges (a subject which itself can be better explored at an evidentiary hearing than by representations of counsel to this Court), we know of only four empirical studies that bear with any immediacy on the relevant factual questions. None of these is published.

a. *The Cody Wilson Study.* (A brief summary of this study, appearing as an article titled "Impartial Juries" in the [Austin] Texas Observer for November 27, 1964, p. 5, col. 1, is reproduced in the Bumpers Record at pp. 78-80. We prefer to describe the study on the basis of

the fuller unpublished report that we have received from Dr. Wilson through Professor Walter Oberer, a procedure that we think appropriate since our submission in this Court does not depend upon the records so far made herein, but urges precisely that further evidentiary hearing is appropriate to develop materials of this sort.)

Dr. Wilson, an Associate Professor of Educational Psychology at the University of Texas, conducted a study in the Spring of 1964, employing 187 junior and senior college students as subjects. Each subject was asked: (i) to vote guilty or not guilty as a juror confronted with brief written descriptions of the evidence in five capital cases; (ii) to indicate the subject's degree of confidence in that vote; (iii) to fix a penalty in each case, choosing within a range from a suspended sentence to life imprisonment (the death penalty thus being excluded); and (iv) to express agreement or disagreement with a series of statements indicative of attitudes toward the criminal trial process and its adverse participants (e.g., "The district attorney's interpretation of the facts in a criminal case is usually more reliable than the defense lawyer's"), and toward certain defenses, such as insanity (e.g., "The plea of not guilty by reason of insanity is a loophole that allows many criminals to escape punishment"). Each subject was asked "Do you have conscientious scruples against capital punishment?" and the subject population was divided for analysis into scrupled and nonscrupled categories on the basis of responses to that question.

Dr. Wilson found that his nonscrupled subjects were (i) more likely to convict, (ii) more confident in their judgments of guilt or innocence, (iii) inclined to impose more severe non-capital punishments, (iv) more likely to be biased for the prosecution and against the defense, and (v) more likely to be biased against the insanity defense,

than were his scrupled subjects. The first three findings were statistically significant under ordinarily accepted standards using the chi-square analysis; the last two approached but did not reach significance, and therefore were treated as indications of direction.

b. *The Faye Goldberg Study.* (Again, although a summary of this study appears at Bumpers R. 73-77, we prefer to refer to a fuller report of it that we have from Professor Goldberg.)

Dr. Goldberg, an Assistant Professor of Psychology at Morehouse College, studied a total of 200 college students, 100 Negro and 100 white. Each was given a set of brief written descriptions of the evidence in 16 capital cases, and was asked to (i) record a verdict (which might be guilty of first degree murder, guilty of a lesser offense, not guilty or not guilty by reason of insanity); and (ii) impose a sentence (which might be death, life, a term of years, or "other"). At the conclusion of this procedure, each subject was asked: "Do you have conscientious scruples against the use of the death penalty?" Interestingly, about half of the subjects who answered this question affirmatively were willing to impose the death penalty in at least one of the hypothetical sentencing situations. As a result, two devices for classifying subjects as "scrupled" versus "non-scrupled" were available: (A) subjects might be classified as scrupled if they answered the conscientious scruples question in the affirmative, regardless of their sentencing performance; or (B) subjects might be classified as scrupled only if they both answered the question in the affirmative and declined ever to impose the death penalty.

Dr. Goldberg finds that, among her subjects, 61% report conscientious scruples. The percentage is higher among women (64%) than among men (59%). [This finding is

consistent with the reported findings of the national polls, such as Gallup and Louis Harris.[59]] It is considerably higher among Negroes (76%) than among whites (47%), although when persons who are willing to vote to impose the death penalty in at least one hypothetical case are classified as nonscrupled, the races are not significantly differentially represented in the scrupled and nonscrupled groups. [This finding is likely affected by the use of college students as subjects. A Louis Harris poll indicates that, on the basis of a national sample, "the more affluent parts of society" generally, and college graduates particularly tend to favor capital punishment, as compared with poorer and less well educated persons.[60]] People who report that they are not scrupled are (i) more likely to convict; (ii) more likely to convict of more serious offenses; (iii) more likely to reject the insanity defense; and (iv) likely to impose a more severe sentence upon conviction. These findings are still more sharply emphasized if the differentiation between scrupled and nonscrupled jurors is made on the basis of sentencing performance as well as the subjects' responses to the conscientious scruples question.

c. *The Robert Crosson Study.* (This is an unpublished doctoral dissertation at the Western Reserve University, titled "An Investigation into Certain Personality Variables among Capital Trial Jurors," and dated January, 1966.)

Crosson studied persons taken from the jury lists of a county court in Ohio. Thirty-six randomly selected "nonscrupled" jurors and thirty-six randomly selected "scrupled" jurors were given a battery of psychological exam-

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[59] See the polls cited in note 38 *supra*. Gallup reports 49% of women opposed to capital punishment, 38% in favor of it; 45% of men opposed, 47% in favor. Louis Harris reports 51% of women opposed, 31% in favor; 43% of men opposed, 44% in favor.

[60] See poll cited in note 38, *supra*.

inations. The nonscrupled group consisted of persons who had in fact been death-qualified and served on capital juries. The scrupled group consisted of persons who had served on non-capital criminal juries, and who answered positively the question whether they had conscientious scruples against the death penalty.

Crosson's principal finding is that nonscrupled jurors tend to be more conservative, less liberal, than scrupled jurors. This difference is statistically significant by accepted measures. There is also a tendency in the data, not reaching significance, that suggests scrupled jurors are better in critical thinking than nonscrupled jurors.

d. *The Hans Zeisel Study.* (This is an unpublished manuscript entitled "Some Insights into the Operation of Criminal Juries," dated 1957. It is a product of the Chicago Jury Study, which is described in, *inter alia,* KALVEN & ZEISEL, THE AMERICAN JURY (1966).)

Dr. Zeisel's findings are based upon interviews of 1248 persons who actually served as jurors in Chicago and New York. A measure of the "prosecution-proneness" of each was derived from comparison of his first-ballot voting with that of his fellow jurors. (The cases on which the jurors sat included a range of criminal charges, only one per cent of the trials being capital.) A number of other attitudes and attributes of the jurors were examined, including their profession of scruples against capital punishment. On the basis of interview data, the juror population was classified as having no scruples, "some" scruples, or "major" scruples against the death penalty.

The only juror attitude examined that was found to be significantly associated with prosecution-proneness was the absence of death scruples. Jurors reporting no scruples were 28% more likely to convict than persons reporting

major scruples. Dr. Zeisel concludes that "jurors who are for the death penalty happen also to be more prosecution prone than the jurors who are against it."

In addition to these four studies, there is little information in the public domain that appears relevant. We have adverted to the national polls (footnote 38, *supra*) showing (A) that a majority of the American public which has made up its mind on the subject of the death penalty opposes capital punishment; (B) that women oppose the penalty in significantly greater numbers than men; (C) that persons in the less affluent and less educated classes also oppose the penalty more frequently than their more affluent and better educated counterparts. There is also a body of psychological literature—that dealing with the "authoritarian personality" [61]—which may well provide psychiatric concepts that explain the noted concurrence of punitive and prosecution-prone attitudes with approval of the death penalty in nonscrupled jurors. But we must admit that although this literature suggests "authoritarians" would likely be nonscrupled (as, also, prosecution-slanted), it lacks specific inquiry into the question whether nonscrupled jurors, as distinguished from scrupled jurors, are characteristically "authoritarian."

4. Materials That Could Be Presented at an Evidentiary Hearing.

The studies just described lend considerable support to the contentions of the *Witherspoon* and *Bumpers* petitioners. As a basis for constitutional adjudication by this

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[61] The leading work is ADORNO, FRENKEL-BRUNSWIK, LEVINSON & SANFORD, THE AUTHORITARIAN PERSONALITY (1950). See Christie & Cook, *A Guide to the Published Literature Relating to the Authoritarian Personality*, 45 J.Psychol. 171 (1958); Sidney, *Certain Determinants and Correlates of Authoritarianism*, 49 GENETIC PSYCH. MONOGRAPHS 187, 191-203 (1954).

Court, however, they do present some difficulties. First, they speak to only a few of the ranging factual issues described at pp. 54-55, *supra*. Second, none of the studies was explicated by expert testimony in the records below; only short, summary, unpublished statements of the studies are available in written form; and these summaries are less illuminating as regards both the significance of the studies and their reliability than would be the testimony of the experts who conducted them. Third, none of the studies purports to be definitive: each is in the nature of a pilot project experimenting with the methodology of investigating the effect of death-qualifying jurors. Fourth, the treatment of the studies by the courts below is equivocal. The Illinois court in *Witherspoon* adverted to the Hans Zeisel study only in connection with the contention that death-qualified juries are prosecution-prone (p. 36, *supra*) and, in this connection, drew from it inferences that we believe unwarranted.[62] The court did not consider the implications of this study or others for the petitioners' other constitutional arguments (pp. 33-36, *supra*). The North Carolina court in *Bumpers* made no mention of the studies put before it; and its phrasing of the constitutional issue decided—in terms entirely of the propriety of excluding scrupled jurors from the *penalty* determination—may have led it to think the principal thrust of those studies immaterial. In addition, as we have noted, the court treated as controlling one of its prior decisions made on a record that did not present the studies.

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[62] "[A] study cited in the petitioner's brief indicates that some jurors qualified for the death penalty tend to favor the prosecution, or, as it is said, to be 'prosecution prone.' . . . [T]he same study indicates that jurors with scruples against the death penalty could be characterized as 'defense prone' . . ." 224 N.E.2d at 262. We believe that this passage reflects a lack of understanding of the meaning and measures of the concepts of "prosecution-proneness" and "defense-proneness" used in the Hans Zeisel study that fuller exploration of the study at a hearing would reveal.

In view of these deficiencies, we believe that this Court should properly insist upon fuller evidentiary records to support its determination of the merits of the scrupled-juror controversy. This would be the case even if, at an evidentiary hearing ordered by the Court, no empirical information were available other than the four described studies. Such a hearing, at the least, would permit the fuller elaboration of the studies by the scientists who made them, and would explore such questions as the relation between questionnaire responses and probable performance as jurors, the generalizability of the study results in light of the subject populations studied, and the level of assurance of the study results so generalized, as measured by accepted standards for reliability of social science research. It would also permit investigation of the relations between the study results and the two other major bodies of available pertinent information: the national polls concerning public attitudes toward capital punishment, and the psychiatric literature of authoritarianism (see p. 61, *supra*). Specifically, the question could and should be pursued whether the attitudes of opposition to capital punishment reported by the polls are convertible in terms of the tests for conscientious scruples used in the studies and in the actual selection of capital juries; while the testimony of psychological and psychiatric experts should explore the significance of the study findings in light of the psychological concept of the authoritarian personality, and should explain the relevance of that concept for prediction of juror performance. Finally, information known to the authors of the studies but not reported by them in their summaries should be developed, and certain ambiguities in the summaries clarified.[63] In addition, information from judicial records relating to the general operation of death-qualification procedures (the tests employed, the amount of interrogation practiced on the *voir dire*, the numbers of venire-

[63] See note 62 *supra*.

men excused), and to other pertinent practical questions (such as the comparative efficiency of single-verdict and split-verdict capital trials) should be examined.

But, in fact, an evidentiary hearing need not be limited to the information provided by the few studies already performed. The major value of those studies, as we see them, has been to establish the feasibility of empirical examination of the factual questions germane to the constitutional issues before the Court. Those studies are instructive as to methodology, and lay the foundation for broader, more relevant studies. We have already embarked upon just such a series of studies, in connection with the numerous capital cases for which we have responsibility (see note 30, *supra*). We describe these as one example of the sort of investigation that is possible and, we believe, will be highly illuminating to the Court.

We have arranged to have Louis Harris and Associates, one of the nationally reputed opinion-study organizations, conduct the study. After consultation with other experts,[64] Harris has developed a three-part study design. One phase involves the investigation of approximately 2000 persons taken by random sampling methods from jury lists of courts having general criminal jurisdiction. Another involves the investigation of a random sample of the population meeting criteria of qualification for jury service (exclusive of the disqualification for death scruples). A third involves the investigation of approximately 300 randomly selected persons who have been death-qualified and served on capital juries.

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[64] These included Professor Harry Kalven, Jr., of the University of Chicago Law School, co-director of the Chicago jury study; Professor Marvin Wolfgang, Acting Chairman of the Department of Sociology at the University of Pennsylvania; Professor Leslie Wilkins of the Department of Criminology at the University of California at Berkeley; and Professor Bernard Diamond, of the Schools of Law and Psychiatry at Berkeley.

The procedures for study of the first two groups are similar. Personal interviews will be conducted of the subjects. They will be asked questions of several sorts designed to measure attitudes toward capital punishment. These will include both questions framed with the assistance of experienced attorneys, to reflect the tests used by courts in death-qualifying jurors, and more general indicators of attitudes previously validated[65] in social science research. On the basis of these questions (which will be refined by pre-testing with pilot groups), a set of measures will be established for the division of the subject groups into "scrupled" and "non-scrupled" categories. The numbers of individuals falling into the respective categories would disclose the proportions of the general population that are "scrupled" under varying tests. "Scrupled" and "nonscrupled" groups will then be compared with regard to other relevant features.

First, demographic data for the subjects will be examined: age, race, religion, income, occupation, schooling, etc. Second, general attitudes of the subjects relating to such traits as humanitarianism, liberalism, opinionation, punitiveness, hostility, race prejudice, etc., will be examined by the use of previously validated scales for the measurement of such traits. Third, general methods and habits of thought (critical thinking, etc.) will be tested. Fourth, attitudes, opinions and beliefs immediately related to the criminal trial process and indicative of the subject's capacity and disposition to accord the defendant a fair, lawful and impartial trial will be investigated. These will include general attitudes toward the prosecution and defense and the appropriate roles and functions of the

[65] See, e.g., SHAW & WRIGHT, SCALES FOR THE MEASUREMENT OF ATTITUDES (McGraw-Hill Series in Psychology) 159-165 (1967).

judge, jury, prosecutor and defense counsel;[66] and also specific pro-prosecution and pro-defense attitudes which are legally defined as impermissible or improper.[67] Finally,

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[66] For example, the subjects will be asked to indicate the degree of confidence they would have, as jurors, in statements by the prosecutor, by defense counsel, by the judge, by other jurors, etc.; and in the testimony of the defendant, the arresting officer, certain sorts of complainants, etc. They will be asked to express degrees of agreement or disagreement with a series of statements purporting to describe the incidents of a criminal trial or the roles of the participants in it, for example: "The lawyer for the accused's main job is to keep innocent people from being convicted"; "The lawyer for the accused is likely to be tricky and not always honest, because he is always trying to get criminals off"; "The prosecuting attorney is likely to be more honest, because he is a sworn officer of the law"; "He is no different from any other lawyer in court and will use any means to get a conviction"; "The judge is supposed to see to it that the public is protected from criminals"; "The judge must guarantee the accused a fair trial". The subjects will be asked to respond to attitudinal questions, for example: "In cases involving people accused of committing crimes, do you feel the courts generally have been too lenient, too harsh, or do you think they have been generally just right and fair with accused criminals?" They will also be asked questions relating to their acceptance or rejection of such legal conceptions as the burden of proof in a criminal prosecution, the insanity defense, the defense of self-defense, etc. (The questions quoted in this footnote have been taken from among the 125 items on a draft schedule prepared by Louis Harris and Associates for the study. They are presently in tentative form, subject to modification. The Harris draft is being circulated to consultant experts in various social science disciplines and to experienced attorneys; after modifications responsive to their evaluations, it will be pretested and further modified before use in the basic study. We have not reproduced here the various standardized response categories used in connection with the respective questions.)

[67] For example, subjects will be questioned as to whether their deliberations as jurors concerning the defendant's guilt would be affected by his failure to take the stand, by their knowledge that the judge had refused to allow the prosecution to put a confession in evidence, by certain kinds of newspaper reports, by certain kinds of legal objections on the part of defense counsel, etc. They will be asked whether a juror who opposes capital punishment would be justified in voting to acquit a defendant he believes beyond a reasonable doubt is guilty; whether, as a juror, he would so vote in certain stated circumstances, etc. In the design of the study, due concern is of course being had to the effect of the court's charge on such matters. (See the parenthetical material at the end of the preceding footnote.)

the subjects will be asked to respond by voting for guilt (of the crime charged or a lesser crime) or innocence (generally or on grounds of insanity), and by choosing among a range of non-capital penalties, on a carefully designed set of simulated criminal trial records. The scrupled and nonscrupled groups will be comparatively evaluated, by the use of accepted statistical techniques, in each of these dimensions.

The study of persons who had been death-qualified and served on capital juries will be somewhat different. These persons will be tested for attitudes, personality attributes and mental processes by measures that will permit comparison of the test results with available data for the population at large. Demographic data on these persons will also be collected in comparable form. Inquiries will be made concerning their experiences, performances and methods of reasoning in deliberation on the capital juries on which they served.

The relevance of this study to the factual questions suggested at pp. 54-55, *supra*, is, of course, evident; and its design is being developed with an eye to obtaining valid and reliable answers to those questions consistently with accepted procedures for social science research. We should make clear that we do not, obviously, mean to intimate that the Harris study itself is the only acceptable instrument for exploring these questions, or that it is the paradigm of the exclusive proper procedure for investigation of them, or even that it will assuredly answer all of the questions satisfactorily. We do believe that it is a responsible and likely productive approach to the questions, however; that its result will be extremely informative to any court which considers the issue of the constitutionality of death-qualification; and that it is suggestive of the kind of factual inquiry whose product can be presented at

an evidentiary hearing with considerable promise of improving judicial consideration of that issue. The study, or something like it, will, we anticipate, demonstrate for the first time in scientific fashion what many have long believed and asserted: that the practice of death-qualification by exclusion of scrupled veniremen seriously distorts the representative composition of the jury and affects its fairness in its fact-determining role.

C. *The Consequent Desirability of an Evidentiary Hearing.*

We think that we have shown in the preceding subsection: first, that factual questions are vitally important to informed consideration of the full range of issues presented by the constitutional challenge to death-qualified juries; second, that those questions are inadequately explored on these two records; third, that the questions cannot be wholly satisfactorily explored by this Court by resort to noticeable information in the public domain; but, fourth, that the questions could be profitably explored at an evidentiary hearing ordered by the Court. In these circumstances, we suggest, the Court should order such a hearing. (The technical propriety of so doing is considered in Part III, *infra*.) The sort of hearing we propose, of course, is one centered on questions of "constitutional" or "legislative" fact, as distinguished from "adjudicative" fact.[68] There is ample support in reason and authority for dispositions of these cases that demand that sort of hearing.

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[68] The terminology is, of course, not original, but has been generally advanced in the developing literature on the process of constitutional adjudication. See, e.g., Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 Supreme Court Rev. 75; Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. L. Rev. 6 (1924); *Note, Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to Courts*, 61 Harv. L. Rev. 692 (1948).

We begin with the proposition that courts, when faced with the delicate task of resolving complex constitutional questions, should and do demand information that illuminates the nature and precise dimensions of the issues posed for decision, and permits an identification and evaluation of the competing considerations pertinent to their determination. That statement, standing alone, seems unexceptionable; it would be difficult to defend a process of adjudication which prefers decision on the basis of less rather than more available and relevant factual material. Courts must have adequate information before them if their decisions are to be bottomed on reality and not speculation. This is as true of decisions on questions of "law" as of decisions on questions of "fact."

Where constitutional claims appear to pose questions of "law," of course, it is sometimes tempting to speculate—to "assume" facts (supposedly those most favorable to the constitutional claimant seeking a hearing) and to decide what the law should be if the facts "assumed" are true. But this practice of determining issues as on common-law demurrer is particularly ill-advised where major constitutional questions may depend upon the undeveloped factual matters. For, in such cases, to substitute speculation for inquiry—to "assume" sets of hypothesized facts and adjudicate constitutional questions in a world of conjecture and imagination—risks two equally grave dangers. It risks, on the one hand, the unnecessary determination of constitutional questions not presented by the real state of affairs, although in future times or other situations they may in fact be presented. On the other hand, it risks judgments that ignore pertinent but unperceived real problems through failure to assume facts that do exist and support the establishment of a significant constitutional principle, but that are beyond the scope of conjecture of

the inevitably limited speculating mind. "The effect would be that important and difficult constitutional issues would be decided devoid of factual context. . . ." *W.E.B. DuBois Clubs of America* v. *Clark,* 389 U.S. 309, 312 (1967), a course that this Court has frequently condemned. E.g., *Rescue Army* v. *Municipal Court,* 331 U.S. 549 (1947); *Massachusetts* v. *Painten,* 19 L.ed. 2d 770 (1968).

In this litigation, in any event, speculation or assumption of the facts would be peculiarly unsound. The plain truth is that no one at this stage of the proceedings—neither the courts below, nor the parties, nor we, nor with deference, this Court—is sufficiently informed to know what states of facts might exist that one could "assume." Not merely the truth but the very character and nature of the facts germane to resolution of the constitutional claims raised in these cases are unknown. But if this be so, we respectfully suggest, settled and proper principles of constitutional adjudication imperatively require the deferment of decision on the merits until they *are* known. The wisdom of this course seems the more compelling where a troublesome and substantial constitutional question is presented upon which depend the lives of the countless condemned men tried or subject to trial by death-qualified juries under the procedure challenged here and practiced in virtually every capital trial in this country.

This course is also most consistent, we believe, with the history of this Court's approach to such momentous constitutional questions. For the Court has always been concerned with the exploration of "constitutional" fact to the exact extent that, given the conception of the ultimate constitutional issue to be resolved, facts were deemed relevant.

There was of course a time in which findings of fact played a relatively small part in constitutional adjudica-

tion. During the period when courts thought that their role was confined to the task of determining—either from the text of a legislative act or the Constitution—the "meaning" of the words employed, there was little need for reliance upon or inquiry into broad scale social or "constitutional" facts. But with the advent of those constitutional concepts which we now characterize as economic due process, and the recognition by courts of their role—indeed their unavoidable burden—of making constitutional policy choices, attention to matters of constitutional fact became essential. The inquiry in such cases was said to be whether the legislation challenged was reasonable or arbitrary—an inquiry which obviously required some knowledge of the field of human economy sought to be regulated. The coming-of-age of the factual inquiry was thus definitively reached in *Muller* v. *Oregon*, 208 U.S. 412 (1908), with the introduction of what has since been known as the Brandeis brief See also *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402, 410 (1926); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, and cases collected at note 2 (1924).

Increasingly since that time, this Court has required proper factual inquiry by the lower tribunals as the condition of constitutional decision. In *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543 (1924), the constitutionality of a statute hinged on a purely factual question: did a state of emergency—which justified the act in the first instance—still exist? Mr. Justice Holmes observed: "The Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law," and the case was remanded to the trial court for the development of those facts. Similarly, in *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194 (1934), the Court referred to the *Chastleton Corp.* case and similar holdings and sent a case back to the lower courts for development of a factual record, remarking that "before questions of constitutional law, both novel and of

far-reaching importance, [are] passed upon by the Court, 'the facts essential to their decision should be definitely formed by the lower courts upon adequate evidence.'" *Id.* at 212. See also *Nashville Chattanooga & St. Louis Ry.* v. *Walters,* 294 U.S. 405 (1935).

The day of economic due process is now long gone. American jurisprudence outgrew that era precisely insofar as—and because—judicial concern for reliable factual inquiry came to replace *a priori* factual assumptions as the basis of constitutional decision-making. The constitutional controversies of today involve somewhat different considerations as the courts attempt to evaluate various claims of individual liberty against competing claims of essential state interests. The kinds of constitutional facts relied upon by the courts have changed to meet the needs of those making constitutional policy choices as they have ventured into new and sometimes uncharted seas. But the process has not changed. For example, in declaring segregation in the public schools unconstitutional in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the Court relied upon facts—in part judicially noticed and in part developed at an evidentiary hearing—indicating the psychological impact of segregated education upon school children. In the unanimous opinion for the Court, these determinations of constitutional fact were specifically noted, see 347 U.S. at 494 nn. 10, 11;[69] and see Greenberg, *Social Scientists Take the*

[69] Footnote 11 collects sociological, psychological and behavioral literature which the Court judicially noticed. Footnote 10 adverts to factual findings made at an evidentiary hearing in the Delaware litigation. The evidence received at the hearing and the conclusions supported by it appear more clearly in the opinion of the Delaware Chancellor (now United States Circuit Judge) Collins Seitz, *Gebhart* v. *Belton,* 87 A.2d 862, 864, 865 (Del. Ch. 1952):

"Plaintiffs produced many expert witnesses in the fields of education, sociology and anthropology. . . .

I conclude from the testimony that in our Delaware society State imposed segregation in education itself results in the Negro children,

Stand, 54 MICH. L. REV. 953 (1956). Contemporary examples of the Court's concern for and intensive exploration of questions of constitutional fact abound. E.g., *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *In re Gault,* 387 U.S. 1 (1967); *United States* v. *Wade,* 388 U.S. 218 (1967).

It may, of course, be objected that, in these cases, the facts on which the Court depended were largely judicially noticed, rather than explored by an evidentiary hearing. To this objection, two responses are sufficient. First, as we have pointed out, there is available in the public domain for appropriate judicial notice far less information concerning the institution of the death-qualified jury than there was concerning station house interrogation (*Miranda*), the juvenile courts (*Gault*), or police lineup practices (*Wade*). The paucity of available information has required us, in investigating our own capital cases, to undertake the major study described at pp. 64-68 *supra,* which is not yet completed. Second, the objection brings to mind what is doubtless the most frequently heard criticism of the decisions on which we rely. Despite the caution with which the Court proceeded in arriving at its conclusions in *Miranda*—despite its exhaustive and comprehensive efforts to cull the pertinent facts from the pertinent sources in the public domain—there has been criticism of the decision for relying upon inadequate information. The precise nature of this criticism is important. The complaint is not that the Court was wrong in looking to the facts, but that the facts the Court found when it looked were wrong or at least questionable. We believe the criticism is ill-taken, but—to the extent it is regarded by any as casting doubt on the Court's ultimate conclusions—that doubt is

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as a class, receiving education opportunities which are substantially inferior to those available to white children otherwise similarly situated."

the more unfortunate because it might have been avoided if the factual record brought before the Court had been more complete. It is therefore both consistent with the jurisprudential method approved in such decisions as *Miranda* and responsive to the most articulate objections of their critics that we urge deferment of decision on the merits in the present cases until after an evidentiary hearing. What we urge, in short—and we perceive no substantial reasons of any sort against it—is simply a plenary hearing at which the parties may produce qualified expert witnesses and other evidence—subject to cross-examination and a fair opportunity for rebuttal on the record—respecting the kinds of constitutional fact that this Court ought to know before attempting to decide the issues in the cases.

III.

The *Witherspoon* Case Should Be Reversed and the *Bumpers* Case Reversed or Remanded.

The course that we have urged is technically proper in the procedural posture of the two cases now before the Court. Pursuant to it, somewhat different dispositions of *Witherspoon* and *Bumpers* are called for.

A. *The Witherspoon Case.*

Witherspoon should be reversed and remanded for an evidentiary hearing. Such a hearing was expressly requested by the petitioner in his application for post-conviction relief. It was denied, and the Illinois courts have rejected his constitutional claim without giving him an opportunity to make a record. If, as we suggest, an opportunity to make a record as the basis of federal constitutional adjudication ought to be allowed, the denial of that opportunity below was error. The Court's decisions

in other state post-conviction cases coming here in a similar posture therefore amply support reversal. E.g. *McNeal* v. *Culver*, 365 U.S. 109, 117 (1961); *Wylde* v. *Wyoming*, 362 U.S. 607 (1960); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116, 123 (1956); *Pyle* v. *Kansas*, 317 U.S. 213 (1942).

B. *The Bumpers Case.*

As we read the record in *Bumpers*, the Court need have no occasion to reach the scrupled-juror issue in that case. The grant of *certiorari* brings here a search and seizure claim that seems uncontestably valid. Bumpers' premises were searched by officers whom his grandmother admitted after they requested entrance under force of a purportedly valid search warrant. At trial, the prosecution declined to rely on the warrant—which presumably was not in fact valid—and sought to sustain the search on the basis of the grandmother's consent. But the consent was given in the face of a claim of right to enter under the warrant, and if the warrant is not shown to be valid, the search is bad. Other Fourth Amendment arguments pressed in Bumpers' brief seem to us also to be correct; but this one appears indisputable. Since the conviction must be reversed on that account for a retrial, this Court would not ordinarily—and in this instance particularly should not—decide an additional constitutional question which the record imperfectly presents.

If, however, the Court reaches the jury question in *Bumpers*, the case should be remanded to the North Carolina Supreme Court in light of *Witherspoon*. This is appropriate for several reasons. First, the record in *Bumpers* is muddy. Summaries of the Cody Wilson and Faye Goldberg studies (pp. 56-59, *supra*) were presented to the North Carolina Supreme Court for the first time, in affidavit form, on the appeal. The court may have con-

sidered them, but it is likely that it did not. It did not advert to them in its opinion. It rested its decision on its earlier opinion in the *Childs* case, where no matters of the sort had been presented to it.[70] Also, its framing of the constitutional issues exclusively in terms of arguments relating to exclusion of scrupled jurors from the *penalty*-determining jury suggests it may have thought that evidence of the partiality of death-qualified jurors on the guilt question was immaterial. The upshot is that the ruling sought to be reviewed here is entirely unclear with regard to the treatment by the North Carolina Supreme Court of the studies submitted to it. It may have accepted and credited the studies; or accepted and discredited them; or deemed them irrelevant; or declined to consider them on procedural grounds. Since the basis of the court's disposition of the federal claim is thus unsteady, a remand in light of *Witherspoon* is in order. Cf. *Villa* v. *Van Schaick*, 299 U.S. 152 (1936); *Nostrand* v. *Little*, 362 U.S. 474 (1960). The North Carolina Supreme Court will thus be free to proceed as it sees fit to implement the holding in *Witherspoon* that a claimant such as Bumpers is entitled to a hearing on proper request. It deserves note that that court has itself been long advertent of the unwisdom of appellate decision on a factually inadequate record and has many times remanded appeals to the lower courts for fuller development of factual questions deemed relevant. E.g., *Gaylord* v. *Berry*, 169 N.C. 733, 86 S.E. 623 (1915); *Gulf Refining Co.* v. *McKernan*, 178 N.C. 82, 100 S.E. 121 (1919); *Greensboro Bank & Trust Co.* v. *Royster*, 194 N.C. 799, 139 S.E. 774 (1927); *Memorial Hospital* v. *Rockingham County*, 211 N.C. 205, 189 S.E. 494 (1937); *Gaster* v. *Goodwin*, 259 N.C. 676, 131 S.E.2d 363 (1963).

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[70] Significantly, the *Childs* case is now pending for hearing on a state post-conviction petition, and the hearing has been postponed to await this Court's decisions in *Witherspoon* and *Bumpers*. *Childs* v. *State*, Super. Ct., Buncombe Cty., N.C., unnumbered, Order of January 29, 1968 (McLean, P.J.).

Finally, considerations of federalism suggest the same course. If Witherspoon is held entitled to a factual hearing on a claim identical to Bumpers', the North Carolina Supreme Court should be given the opportunity to decide in the first instance whether that holding by this Court persuades it to a different course of action than the one that it has heretofore taken in regard to the factual matters presented on the appeal by Bumpers. Cf. *Patterson* v. *Alabama,* 294 U.S. 600, 606-607 (1935); *Williams* v. *Georgia,* 349 U.S. 375, 389-391 (1955); and see *Ashcraft* v. *Tennessee,* 322 U.S. 143, 155-156 (1944); *Giles* v. *Maryland,* 386 U.S. 66 (1967).

IV.

The Problem of Retroactivity.

As counsel for a very great number of condemned men, most of whom we have undertaken to represent for the first time at a post-appeal stage (see pp. 3-M–6-M, *supra*), we are naturally extremely concerned with the question of retroactivity of any constitutional rule which the Court may announce in these cases. Our principal submission, developed above, that the Court should defer decision of the scrupled juror question on the merits at this time, has of course not been affected by this concern.[72] Nevertheless,

[72] We have not been unaware that the effect of deferring decision on the merits in *Witherspoon* and *Bumpers,* as we urge, will be to deprive those two petitioners of their "lead" position in this Court on the points they raise. Decision may go against them on the remand, and before they return here other cases may be brought to the Court. We suppose it is possible, also, that one of those other cases may be a litigation that we are handling. But we would regard it as highly improper for us to advocate the deferment of decision by this Court *because* of any such consideration, and we have not done so. Indeed, any temptation in this direction which we might otherwise have had to combat has been avoided by the very nature of our involvement in these capital cases. We have always had to consider our responsibilities for them as running both to the individual client and to the class of condemned men, since we have made ourselves generally available to represent members of the class.

a secondary consequence of the Court's accepting that submission would obviously be to pretermit a present decision of all issues of retroactivity, together with decision of the substantive constitutional controversy.[73] On the contingency that the court may reject this approach, however, and that it may dispose of the constitutional merits of the claims by Witherspoon and Bumpers in their favor, we proceed to discuss perforce the retroactivity question.

Our position on that question is two-fold. First, we urge that, even if the Court should decide the substantive merits of the scrupled juror issue at this time, on these records, it should not now decide the retroactivity question. Second, if the retroactivity question is decided now, we urge

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It would be unthinkable, in this posture, for us intentionally to sacrifice the interests of one to another. And we have had to hope, of course, that the application of this Court's rules of retroactivity would not be such as to force us *un*intentionally to do that thing.

[73] This is so whether the question of applicability of a newly announced constitutional rule to cases predating (in some sense or other) the rule's announcement is conceived technically as a question of "retroactivity" proper, as in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), and *Tehan* v. *Shott*, 382 U.S. 406 (1966), or as a question of distinguishing between direct and collateral review, as may have been done in *Stovall* v. *Denno*, 388 U.S. 293 (1967) (decided on the same day as *United States* v. *Wade*, 388 U.S. 218 (1967)), despite the apparent rejection of this approach in *Tehan*, *supra*, at 410 n. 5. It is true, of course, that the *Witherspoon* case comes here at this time on collateral attack. But we have been able to urge a reversal of the Illinois Supreme Court judgment in that case, without discussion of any question related to its post-conviction posture, because the Illinois court itself chose to reach and to dispose of Witherspoon's federal constitutional contention on the merits. This it was and is *free* to do irrespective of any question whether it was *compelled* to do so, see *Johnson* v. *New Jersey*, 384 U.S. 719, 733 (1966); and when it chose to entertain the federal claim on the merits, it thereby subjected its decision to review on the merits by this Court, again irrespective of any question whether it was federally obliged to hear the claim. Compare *Thomas* v. *Collins*, 323 U.S. 516 (1945), with *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Our suggested disposition of *Witherspoon*, therefore, neither depends upon nor implicates any decision regarding the retroactivity or collateral availability of the scrupled-juror contention.

that the Court hold any ruling it may make invalidating the death-qualification of capital juries retroactive as to cases in which the death sentence was imposed, even though non-retroactive as to other cases.

A. *The Court Should Not Decide the Question of Retroactivity at This Time.*

This Court's most recent formulation of the inquiry dispositive of the question whether a newly announced constitutional principle will be given retroactive application identifies the following criteria:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967).

Under the first of these criteria, the critical if not controlling question will often be the degree to which the constitutionally condemned practice affects "'the very integrity of the fact-finding process. . . .'" *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1966), quoting *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965), and thereby distinguishing *Jackson* v. *Denno,* 378 U.S. 368 (1964). Where a substantial effect tending to impugn the *reliability of the trial disposition* is found to adhere in the practice, its condemnation will ordinarily be applied retroactively, even though official reliance upon it may have been heavy and the official inconvenience occasioned by its retrospective overrule may be substantial. Thus does *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966), explain the retroactivity of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), on the principle that the denial of counsel, condemned by *Gideon,* tends to "infect a criminal proceeding with the clear danger of convicting the

innocent." And, of course, an unconstitutional practice that jeopardized the integrity and reliability of the *sentencing* process would have the same claim to retroactive application as one that similarly affected the *guilt-determining* process, for the same reason. This we may infer from *Mempa* v. *Rhay*, 389 U.S. 128 (1967), wherein, as in *Gideon*, the Court "reviewed a denial of habeas corpus." *Johnson* v. *New Jersey*, *supra*, at 727. That the rule of *Mempa* is retroactive cannot, therefore, be doubted. See, e.g., *Bresolin* v. *Rhay*, 389 U.S. 214 (1967).

Simply to state these principles is to make obvious, we believe, the impracticability of deciding the retroactivity question on these records. For even though it may be possible in the absence of an adequate evidentiary hearing for the Court to resolve the substantive issue of unconstitutionality of excluding death-scrupled jurors, it is *not* possible to determine without such a hearing the prejudicial effects of that unconstitutional practice on a capital jury's determinations of guilt and sentence. We have had to concede, earlier in this brief, that the substantive determination of the scrupled juror issue at this time, in these cases, was a feasible—albeit, we submitted, a highly undesirable—procedure. But this was the case only if the Court should adopt a method of approach to the issue that perceived in the death-qualification practice a logical and systemic violation of the constitutional command of jury representativeness, and did not stop to weigh the effects of the practice either as denying the defendant a fair and impartial jury on the guilt issue or as prejudicing him in fact on the penalty determination. (See pp. 51-53, *supra*.) These latter points of concern are simply inadequately developed on the record, we believe, to support a substantive constitutional determination either way grounded on them (see pp. 54-74, *supra*); and we now submit that,

for greater reason, they are inadequately developed to support an informed ruling on retroactivity, which ordinarily demands a far more finely calibrated measurement of actual pressures and prejudices of an institution in operation than is required for constitutional appraisal on the merits of the same institution. Compare *Johnson* v. *New Jersey, supra,* with *Miranda* v. *Arizona,* 384 U.S. 436 (1966). In this connection, we are mindful that this Court has said that for purposes of the retroactivity question, the determination that a condemned practice slightly or indirectly affects the reliability of the fact-finding processes does not mechanically require a retroactive application of the rule:

> "'[T]he question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' *Johnson* v. *New Jersey, supra,* [384 U.S.] at 728-729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.' 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall* v. *Denno, supra,* at 298.

If the matter were one for easy intuition, we would think it obvious that the practice of excluding from capital juries those persons opposed to the death penalty has an overwhelming effect on the composition of those juries, and our every instinct and our experience with capital cases tell us that this effect is profoundly detrimental to the defendant on both the issues of guilt and penalty. We have outlined previously in this brief what we expect an evidentiary hearing to show in this regard, and have in-

dicated to the Court the kinds of evidence which we think might profitably be examined—including the results of studies in the nature of the one to be conducted by the Louis Harris organization. But until such a plenary hearing has been held, this Court cannot know the extent to which the process of guilt determination, in particular, is distorted by the death-qualification practice. It thus can have no basis, we respectfully suggest, to begin the business of precise weighings and judgments that determination of retroactivity under the prevailing tests demands.

This consideration compellingly indicates the need for additional information about the operation and effect of the practice of death-qualifying juries in capital cases in order to evaluate the retroactivity question within the framework of the Court's decisions on that question. Unlike *Linkletter* v. *Walker*, 381 U.S. 618 (1965) and *Tehan* v. *Shott*, 382 U.S. 406 (1966), where the integrity of the guilt-determining process was not in issue, and unlike *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) and *Stovall* v. *Denno*, 388 U.S. 293 (1967), where the effects of the condemned practices, if any, on the fact-finding process were likely to be minimal[74] and were in any event well

[74] The *Miranda* rules which the Court refused in *Johnson* to apply retroactively were prophylactic and intended to protect against involuntary waivers of the privilege against self-incrimination. The possibility that they also may serve to prevent confessions which not only are involuntary but *also* are unreliable exists but must be regarded as slight. Moreover, the pre-existing legal tools for dealing with involuntary confessions—whether reliable or not—provided considerable assurance that even without the *Miranda* rules, the integrity of the fact-finding process would be preserved. See, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737 (1966).

Similarly, the rules respecting counsel at suspect identifications, which this Court refused in *Stovall* to apply retroactively, affect the reliability of the fact-determining process only slightly, particularly in light of the continuing availability of the constitutional defense to a procedure by which the defendant was identified, that it violated the Due Process Clause. See *Palmer* v. *Peyton*, 359 F.2d 199 (4th Cir. 1966), cited in

understood by the Court at the time the cases were decided, the effects on the guilt-determining process in the present cases are not known but are likely to be substantial. This is all the more critical when the issue arises in the context of capital cases and the resolution of the retroactivity question directly affects the lives of over four hundred men now under sentence of death. The Court, we respectfully suggest, will be fully justified in proceeding with caution to evaluate the assertion that this new constitutional principle should be given only prospective application where there is the substantial possibility that hundreds of condemned men have been convicted and sentenced to death by procedures which lack the reliability that justice requires when the State proposes to take human life.

The desirability of deferring resolution of the retroactivity question is enhanced by an additional consideration, perhaps unique to these cases. To do so will permit the impact of this Court's decision on the merits of the scrupled juror question to be absorbed and considered by the various governmental departments of those States which are affected by the decision. This may well be critically important—quite apart from any consideration of the ultimate question of retroactivity *in the constitutional sense.* For it may be that in many instances, whether by legislative act, exercise of a state court's power of judicial supervision over the criminal process, or by executive order, some States will decline to execute men on the basis of a constitutionally defective procedure which has deter-

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Stovall v. *Denno, supra.* See also *People* v. *Caruso,* 68 Adv. Cal. 181 (1968). And, of course, the entire subject of suspect identifications was elaborately canvassed by the Court in *United States* v. *Wade,* 388 U.S. 218 (1967); the question of its suitability for accurate fact-determination was well understood by the Court which that same day decided *Stovall.*

mined that they must die, irrespective of whether the State is going to be required by a decision of this Court to give retroactive application to the newly announced constitutional rule.

We have in mind these practical considerations: A decision of this Court striking down the practice of excluding scrupled jurors in capital cases will focus immediate attention upon the situation of those now condemned to die and the procedures by which their guilt was determined. When this Court ultimately proceeds to decide whether that decision shall be retroactively applied, it must attempt to weigh a number of often problematical considerations, and the outcome of that deliberation is a rather arbitrary compromise—perhaps the best that can be done considering the intrinsic difficulties of the inquiry, but an arbitrary compromise nonetheless. Perhaps it will be that this Court will be forced to conclude that the principle forbidding exclusion of scrupled jurors need be given, as a matter of federal constitutional law, only prospective application. Yet there may be those—perhaps state judges who are personally responsible for the decision which sends a man to the execution chamber, perhaps a sensitive governor unwilling to permit an execution where there is the slightest flaw in the guilt or penalty-determining precedures, possibly a concerned legislature —who do not chose to permit those convicted by unconstitutionally death-qualified juries to go to their deaths as the result of this sort of arbitrary compromise. An immediate decision of this Court holding the rule non-retroactive would likely, as a practical matter, thwart such local benevolence if only because of the intense political pressures that are brought to bear on the execution of the death penalty. Deferring decision of the retroactivity question will permit the fullest possible consideration, on a local

basis, of the equities of affording new trials to those condemned to death by means of an unconstitutional procedure.

B. *The Ruling on the Scrupled Juror Question Should Be Applied Retroactively to Those Cases in Which the Death Penalty Has Actually Been Imposed.*

Notwithstanding the foregoing considerations, the Court may feel compelled to rule on the retroactivity question at this time. Our submission on the merits of that question may be shortly stated. Those cases in which capital defendants suffered the full impact of the death-qualification practice, in that the death sentence was actually imposed upon them, must be given the benefit of a decision retroactively upsetting the practice. It is in their cases that the practice worked its most pernicious and prejudicial effects. The burden upon the administration of justice of this much limited retroactivity is inconsiderable—certainly not considerable enough to warrant putting men to death on account of fortuities of timing in their appearance before this Court.

As we have previously said, the prior decisions of the Court—most notably the recent decision in *Stovall* v. *Denno, supra,*—establish that the determination of whether a newly announced constitutional principle is to be given retroactive application involves a weighing of the effect of the condemned practice on the reliability of the fact-determining and sentencing processes against such countervailing considerations as the "reliance" of the various state agencies and officials on the existence of the prior and contrary principle, and the burdens put upon those agencies and officials by requiring retrials of persons convicted under the condemned practice.

As for the first consideration, there can be little doubt *on the basis of the presently known information* (see pp.

56-61, *supra*) that the practice of excluding from capital juries all those persons conscientiously scrupled against the death penalty has some significant impact on the guilt-determining process. We need not repeat what we have earlier said respecting this effect; suffice it to say that those jurors who survive death-qualification tend to be those members of the community who are most prosecution-prone. And, where as is universally the case, the jury also has broad, uninstructed, and unfettered discretion to determine whether or not the death penalty is to be imposed, death-qualification works a still more obvious and egregious prejudice. It distorts the operation of a system designed to determine the penalty question on the basis of the "collective conscience" of the community by stripping it of the influence of those persons whose own "conscience" opposes capital punishment, and by reinforcing and supporting the deathful instincts of the rest.

This, then, is one side of the balance sheet. On the other rest the twin considerations of "reliance" and the impact on the administration of justice if retrial is ordered for those tried by death-qualified juries.

The reliance factor, we respectfully submit, is not a weighty consideration here. The degree of reliance involved is considerably less than in other areas—the appointment of counsel for indigents; the procedures for determining the voluntariness of confessions—where this Court has retroactively imposed newly announced constitutional principles. The Court has never written an opinion sustaining death-qualification against constitutional challenge. For a number of years there has been respectable academic criticism of the practice, e.g., Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 Texas L. Rev. 545 (1961), which might have alerted those charged

with the administration of criminal justice that excluding scrupled jurors was of doubtful constitutionality. Indeed, the majority opinion in *Fay* v. *New York*, 332 U.S. 261 (1947), pretty plainly told those who cared to read that *if and when the practice could be proved to result in prosecution-prone or unfairly biased juries*, the Court would strike it down. Prosecutors and judges of average experience, knowing what all others of experience know about death-qualified juries but believing that it could never be proved on the record to the satisfaction of appellate courts, are hardly the sympathetic proponents of a legitimate reliance interest.

More substantial is the consideration of the burden on the administration of justice in the States if all those heretofore tried by a death-qualified jury are now to be given a new trial. This group includes not only those condemned to be put to death, but also the presently incarcerated persons who were convicted of lesser crimes, or given lesser penalties following a trial for a capital crime at which the jury had been death-qualified. While we do not know precisely the size of the latter category, we may assume that it is large. And because these are cases in which terms of imprisonment may be quite long, presumably they include quite a few cases in which the convictions are stale and retrial a practical impossibility.

In contrast, the number of persons actually condemned to death is relatively manageable—slightly over 400 in the United States by the most recent count. Some of these pleaded guilty and might not have standing to assert the scrupled juror claim; others were tried to the bench in jury-waived proceedings; still others are now on direct appeal and may be given new trials on other grounds. The actual number of those persons who would be retried because of a retroactive ruling of this Court is, therefore, small, and their cases are not likely to be stale unless pro-

ceedings therein have previously been protracted by a cumulation or succession of other fundamental errors. Moreover, these men are scattered around the country and the burden imposed on any given State—or county in a State—would be extremely slight.

Our submission is that the line of retroactivity may properly be drawn between those persons who have been subjected to the extreme penalty of death and those who have not. There is, concededly, no express constitutional basis for the fixing of such a boundary. Its groundroot must be referred to the simple and civilized principle once stated by Mr. Justice Frankfurter for the Court: "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955). For varying exemplifications of the principle, see, e.g., *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Stein* v. *New York*, 346 U.S. 156, 196 (1952); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961).

Recognizing the difference between life and death as "the basis of differentiation" for this purpose necessarily involves a candid avowal that the law of constitutional retroactivity—the process of determining that a particular constitutional decision of this Court shall be limited to prospective application only—calls for essentially intuitive line drawing, which itself finds no express support in the Constitution, but which is rapidly becoming fundamental to "[s]ound principles of decision-making." *Stovall* v. *Denno*, *supra*, 388 U.S. at 301. We do not apologize for so labeling the process which this Court has invoked in recent years, for there is no criticism implied. It is a practical solution to an intensely practical problem, and there can be little surprise that it sometimes needs come down to a matter of rather arbitrary judgments. Messrs. Miranda, Vignera, Westover, and Stewart were the fortu-

nate beneficiaries of the Court's decision that their cases were appropriate for review of the questions flowing from *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); dozens of other prisoners, whose petitions for *certiorari* were contemporaries of the fortunate four, did not receive the benefit of the rules announced in *Miranda*. The same can be said of Messrs. Wade and Gilbert, whom this Court has described as "chance beneficiaries" of the rulings in their cases. *Stovall* v. *Denno*, *supra*, 388 U.S. at 301. It is therefore not with any justification based on air-tight logic or the satisfaction of tidiness that we ask for the fixing of a boundary which, although possessed of characteristics which some may regard as arbitrary, serves fairly well to distinguish categories of cases which do possess significant differences. It is rather with unhappy resignation to the necessity for a regime of intuition and some arbitrariness; and with a firm conviction that *this* intuition, *this* arbitrariness, are sound if any are.

First, the gravity of the death penalty in contrast with any punishment of imprisonment for a term of years itself justifies disparate treatment. To treat those matters differently does no more than to reflect those human impulses which we submit are shared by the public at large and represent fundamental values of our heritage. These require that, if the state must take a life as punishment for the commission of a serious offense against society, it may do so only after affording the accused every possible fair opportunity and lawful procedure to acquit himself, and only when there is no possible doubt of his guilt or the fairness of his condemnation. While we may have to accept that our system of criminal trial and punishment is not perfect, and to tolerate the possibility that men may be imprisoned for crimes of which they are not guilty, surely that possibility is intolerable where life itself is at stake.

Second, the finality of the death penalty offers an additional basis of distinction. Once imposed, the extreme sentence is irreversible. Persons serving even extended sentences in prison may be unable to assert the exclusion of scrupled jurors as an objection to the reliability of the fact-finding procedure by which they were convicted. But they possess other procedural alternatives (including judicial new-trial motions and post-conviction remedies, applications for executive clemency or pardon) through which to assert that that fact finding procedure *was* in fact—in various ways—if this be provable—unreliable. These alternatives, unavailable after execution of the condemned man, highlight the reason for treating his case differently and allowing him extreme latitude in challenging the validity of the procedures by which he was adjudged guilty of a capital offense and sentenced to death. For it must not be forgotten, as this Court has said, that the extent to which a constitutionally infirm practice infects the integrity of the truth-determining process is "'a question of probabilities,'"[75] not of certainties. To equate the probabilities on which a civilized jurisprudence properly takes judicial action in a non-death case with that level of probability that should be required before a court acts to seal its judgment forever against revision or correction—sending a man to death—is, we suggest, purblind or perverse.[76]

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[75] *Stovall* v. *Denno, supra,* 388 U.S. at 298.

[76] In saying this we do not ignore that *Johnson* v. *New Jersey* and *Stovall* v. *Denno* were capital cases (*Stovall* in form only, since the New York abolition statute was, of course, being given retroactive application via executive clemency). But the significance of the fact that they were capital cases was not argued to or discussed by the Court in either case; and the constitutional rules in question in both—being general matters of criminal procedure not uniquely related to death cases—did not invite consideration of the peculiar concerns implicated by the application of the Court's general rules of retroactivity to constitutional decisions invalidating practices that affect particularly death cases. We now urge those considerations on the Court.

Third, as we have pointed out above, the exclusion of jurors scrupled against the death penalty affects both the guilt-determining and the sentence-fixing processes. In both regards it is challenged as violating the Constitution and wronging the defendant on his trial. But the defendant who is sentenced to death alone feels the full brunt of the practice—suffers the extreme, incomparable injury worked by the asserted constitutional violation in the sentencing phase. Whatever doubts one may have as to the "probabilities" that death-qualifying a jury affects its guilt deliberations, no doubt can for a moment be entertained with regard to its sentencing function. It is to affect that function that is the explicit, professed purpose of qualifying the jurors on the death penalty; and any assertion which denies that the procedure has its designed effect must surely lack both legal and common intelligence. Pervasively in this country, the capital jury decides the question of life or death in the exercise of an undirected, limitless and wholly arbitrary discretion. It sits not to apply rules of law but to enforce its social philosophies, prejudices or whims for or against the defendant's life. Literally the only predictable determinant of what it will do, whether it will speak for life or death, is the collective attitude of the twelve jurors in the box. Death-qualification is the single major determinant of that attitude, which it affects both by systematically screening the persons of the jurors against the possibility of minds conscientiously principled to vote for life, and by driving home in the minds of the remaining jurors, through repeated iterations at the outset of the capital trial, the message that death is the penalty, the approved and prepared-for penalty, at which the proceeding must undeflectedly aim.

Certainly, then, if the exclusion of scrupled jurors from the penalty determination is itself held unconstitutional, that rule must have retroactive application to death-

sentenced defendants. Indeed, only if the Court affirmatively holds that death qualification at the penalty phase does *not* violate the Constitution (although death-qualification at the guilt phase does), could there be any slightest doubt of the retroactive extension of the constitutional holding to these men. But, even if this be the nature of the Court's decision on the merits, we believe that the unique sort of prejudice suffered in the penalty determination by death-sentenced men supports their claim of entitlement to its retroactive benefits. For whatever the basis of the constitutional violation found, the damaging *effect* of death qualification upon the penalty decision in the case of each such man is undeniable.

This effect is exaccerbated under the usual single-verdict capital trial practice. At every single-verdict trial heretofore held before a death-qualified jury the same procedure which denied the defendant (as it is now held) a constitutional trial on the guilt phase, also had two other effects. It forced him to a determination of his sentence by the same guilt-qualified jury, with all that that implies; and it authorized this result in the course of a single-verdict proceeding—a form of trial that is extremely prejudicial, for independent if related reasons.[77] Following the constitutional invalidation of the practice of death-qualifying jurors for the guilt determination, no capital defendant could be subjected to more than one of these latter two adversities. Systematic exclusion on the guilt phase being forbidden, the State is required to give up *either* the single-verdict trial *or* death-qualification of the penalty determining jury. The coincidence of the two in a trial conducted prior to the constitutional decision outlawing the practice therefore deviated substantially, to the defendant's detriment on the penalty issue, from the sort of trial to which

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[77] See pp. 17-18, 20 *supra*.

the constitutional decision entitles him—even though that decision be based exclusively, as a doctrinal matter, on his rights in the guilt phase. For this reason, death-sentenced defendants tried by this procedure have suffered a kind of prejudicial effect of death-qualification that others have not; the effect is one that directly impugns the propriety of the penalty disposition; and we submit it follows that each of these defendants may plainly complain retroactively of an unconstitutional practice that *also* was designed to and did deprive him of his life.

CONCLUSION

The Court should not reach the merits of the constitutional challenge to exclusion of scrupled jurors raised in these cases at this time. *Witherspoon* should be reversed for an evidentiary hearing on the constitutional facts essential to considered adjudication of that challenge. *Bumpers,* if not reversed on other grounds, should be remanded in light of *Witherspoon.* Even if the Court reaches the merits of the controversy, it should not now speak to the question of retroactivity. If the retroactivity question is decided, any rule invalidating the practice of death-qualifying capital juries should be held retroactive as affects men sentenced to death in a trial by such a jury.

Respectfully submitted,

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APPENDIX

APPENDIX I

Excerpts from the Voir Dire Examinations Of Prospective Jurors McCarley and Lewis In *People* v. *Arguello* (Tr. 308-311), Now Pending on Federal Habeas Corpus Sub Nom. *Arguello v. Nelson*, U.S.D.C., N.D. Cal. No. 47622.

[Mrs. McCarley]:

Q. All right. Do you have any conscientious objections against the imposition of the death sentence? A. Not if it is the law.

Q. Yes. But you, as an individual, do you feel that you could personally impose the death sentence in a proper case? A. In a proper case because it's the law.

Q. Well, are you in favor of the law or are you in favor of abolishing the death sentence?

Mr. Whelan: That's objected to as improper voir dire.

The Court: Objection sustained.

(By Mr. Meloche):

Q. Do you entertain any conscientious objections against the imposition of the death sentence yourself? A. Because it's the law, and because we live by this law, I feel that the death sentence in its proper place should be used as a tool of the law.

Q. But regardless of it being the law or not, as an individual do you have any personal conscientious objections against the imposition of the death sentence? A. If I could change the law, I would change the law.

Q. In other words, you do have a conscientious objection against the imposition of the death sentence, then, is that correct? A. Yes. I would prefer that it was not the law.

Mr. Meloche: Your Honor, at this time I would ask that she be excused for cause. She entertains a conscientious objection and I appreciate your candid statement Mrs. McCarley.

The Court: Is that true, Mrs. McCarley?

Mrs. McCarley: That's true.

The Court: You entertain a conscientious objection?

Mrs. McCarley: I would rather that it was not the law.

The Court: All right. You may be excused.

* * * * *

[Mr. Lewis]:

Q. Do you have any objection to serving as a juror in this particular case? A. No.

Q. You are aware of the responsibilities involved? A. Yes.

Q. And you are willing to assume that responsibility? A. Only in an extreme case could I ever give the ultimate penalty; very extreme case. I would be inclined to be lenient, is what I mean.

Mr. Whelan: I didn't get the last.

The Court: She would be inclined to be lenient.

By the Court:

Q. Well, I take it, then, you have some conscientious scruples against the imposition of the death penalty? A. Yes, some. I could in a very extreme case, as I say.

Q. You would set up your own standard, though, of course? A. No, sir. If the person were proven, well, to be perfectly blunt not fit to live, I could; otherwise I could not.

Q. Well, again I will ask you: You do have some conscientious scruples against the imposition of the death penalty. A. Yes.

The Court: You may be excused.

APPENDIX II

Excerpt From the Voir Dire Examination Of Prospective Juror Timberlake, In *People v. Saterfield* (Tr. 83-85), Now Pending On Habeas Corpus, *Matter of Saterfield*, Cal. S.C. Crim. No. 11573.

The Court: Do you know of any reason why you couldn't sit as a fair and impartial juror in a trial of this nature?

Mr. Timberlake: Well, I have thought about four points, but, don't get me wrong, I want to serve and do my duty if I am chosen.

The Court: Do you have a quarrel with the death penalty?

Mr. Timberlake: No. That might be one of the points, but still I know it is the law, so I want to go along with the law.

The Court: Do you hesitate to apply that law?

Mr. Timberlake: No.

The Court: If you found, under the instructions. that it should be applied.

Mr. Timberlake: No.

The Court: In this particular case.

Mr. Timberlake: No.

• • • • •

Q. . . . what are the remaining things? A. Well, one was two to three weeks; another one you brought up, the flu situation; I have a daughter at home with a fever, my Quaker background—

Mr. Enright: I will stipulate, your Honor—

The Court: I don't think you have to go any further.

Appendix II

Mr. Riccardi: I would so stipulate, your Honor.

The Court: Thank you, Doctor. I know you want to do your duty, and you did by informing us of your Friend's belief. I don't think we can accept you on a jury involving a possible death penalty, but we thank you for coming forth with the information. You may be excused. Call another juror.

APPENDIX III

Excerpt From the Voir Dire Examination Of Prospective Juror Upchurch, in *People* v. *Schader* (Tr. 247), Appeal Pending, Cal. S. C. Crim. No. 9855.

By the Court:

Q. I still can't understand, Mrs. Upchurch, how the fact that you have children could possibly affect your judgment in the case. Do you have something else? A. No, your Honor. I was just thinking if it were my son.

Q. Almost everyone in this jury box has children. A. I know.

Q. And responsibilities, and—you indicating to the Court you might tend to favor these defendants because you have sons? A. I might.

* * * * *

The Court: You will be excused, Mrs. Upchurch, and I think if you have that attitude, you'd best retire from jury service. If you have this emotional approach to things, you do not belong as a juror. So you will be permanently excused.

Mrs. Upchurch: All right. Thank you.

SUPREME COURT, U. S.

MAR 18 1968

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON,

PETITIONER,

v.

STATE OF ILLINOIS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

No. 1016

WAYNE DARNELL BUMPER,

PETITIONER,

v.

STATE OF NORTH CAROLINA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF OF F. LEE BAILEY AS AMICUS CURIAE

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BRIEF OF F. LEE BAILEY AS AMICUS CURIAE

The consent of the attorneys for the respective petitioners has been obtained. The consent of the attorneys for the respective respondent-governments was requested but was not given. This brief is filed by order of the Court.

Interest of Amicus Curiae

The interest of *Amicus Curiae* in these cases arises from the fact that he is counsel to defendants in two cases presently pending in state appellate courts in which the same issue is before the court, namely, whether a State's exclusion from a jury of persons opposed to or with conscientious scruples against capital punishment violates the Sixth and Fourteenth Amendments to the United States Constitution. *Commonwealth* v. *George H. Nassar,* #13995, Supreme Judicial Court, Massachusetts; *Carl Coppolino* v. *State of Florida,* #67-193, Florida Appellate 2. In each of those cases, the defendant was not given the death sentence, although his jury was "qualified" on capital punishment. A more general interest of *Amicus Curiae* in these cases before this Court arises from the fact that he is a member of the criminal bar, specializing in capital cases, having represented the defendants in over 20 homicide cases, and is therefore greatly concerned with the administration of justice in capital cases.

Argument

I. By The Systematic Exclusion From The Jury Of Persons Who Were Opposed To Or Had Conscientious Scruples Against Capital Punishment, The Defendant Was Deprived Of A Jury Which Fairly Represented A Cross Section Of The Community, And Assured The Prosecution Of A Jury Whose Members Were Partial To The Prosecution On The Issue Of Guilt Or Innocence In Violation Of The Sixth And Fourteenth Amendments To The United States Constitution.

It is beyond dispute that, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas,* 311 U.S. 128 at 130, 61 S.Ct. 164 (1940); *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457 (1942). The systematic and intentional exclusion from a jury in a state court of any economic, social, religious, racial, political, or geographical group of a community is in violation of the Fourteenth Amendment to the Constitution of the United States. *Patton* v. *Mississippi,* 332 U.S. 463, 68 S.Ct. 184 (1947); *Norris* v. *Alabama,* 294 U.S. 587, 55 S.Ct. 579, (1935); *Eubanks* v. *Louisiana,* 356 U.S. 584, 78 S.Ct. 970 (1958); *Hernandez* v. *Texas,* 347 U.S. 475, 74 S.Ct. 667 (1954); *Thiel* v. *So. Pacific Co.,* 328 U.S. 217, 66 S.Ct. 984; *Labat* v. *Bennett,* 365 F.2d 698 (CA 5 1966) cert. denied, 35 U.S. Law Wk. 3272 (1967).

While the above cited cases have involved the intentional exclusion from juries of Negros (*Patton* v. *Mississippi,* supra; *Norris* v. *Alabama,* supra; *Eubanks* v. *Louisiana,* supra), Mexicans (*Hernandez* v. *Texas,* supra), wage earners (*Thiel* v. *S. Pacific Co.,* supra; *Labat* v. *Bennett,* supra), this Court has always made it clear in its opinions that

the intentional exclusion from a jury of any identifiable group of a community, is unconstitutional. See, e.g. *Thiel* v. *S. Pacific Co.*, 328 U.S. at 220.

People who are opposed to or have conscientious scruples against capital punishment are an identifiable political and social group. The Gallup public opinion survey released on July 1, 1966 indicates that more people in the United States are opposed to capital punishment than are in favor of it. *The Gallup Public Opinion Survey;* Princeton, New Jersey; July 1, 1966. That poll showed that 47% of the American people opposed the death penalty while only 42% are in favor of it. It also showed that the number of people opposed to capital punishment has increased steadily from 1965, from 1960, from 1953. The American Bar Association's *Project On Standards Relating to Fair Trial and Free Press* views qualified public opinion surveys as reliable indices of community views. *Project on Standards Relating to Fair Trial and Free Press,* Advisory Committee on Fair Trial and Free Press, American Bar Assoc., 1967.

In the instant cases, the respective trial courts permitted persons opposed to or with conscientious scruples against capital punishment to be excluded from the jury. By doing this, the trial court excluded an identifiable group of the community, thereby denying defendant the Equal Protection of the laws. If defendant had been charged with a non-capital offense, prospective jurors would not have been "qualified" on the death penalty.

The theory for "qualifying" a jury on the death penalty is to give the prosecution an impartial jury for the purpose of punishment. But, more fundamentally, defendant is entitled to an impartial jury on the issue of guilt or innocence. A defendant is prejudiced, whether or not he receives the death penalty, if he is tried by a jury "qualified" on capital punishment. Recent law review articles, citing numerous

psychiatric and other authorities, argue that, "The jury qualified in the death penalty is one more apt to convict, quite apart from the degree of punishment to be assessed . . . A defendant tried before such a jury is denied a fair trial on the *basic issue of guilt or innocence . . .*" *Oberer,* 39 Texas Law Review, 545 (1961). Professor Oberer's thesis, shared by Dr. Filmore H. Sanford, Professor of Psychiatry at the University of Texas, is that, "A jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members. Human sympathy is hardly subject to nice compartmentalization. Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach." 39 Texas Law Review at 549 [citing, among others, Adorno, et al., *The Authoritarian Personality* (1950)].

A recent North Carolina Law Review article said, "The Courts and legislatures . . . should be made aware of the psychological data indicating that a [death qualified] jury from which this large segment of society has been excluded, may result in prejudice to the defendant on the question of his guilt . . . hopefully, the Constitutional implications of this practice will lead to judicial decisions or legislation to the effect that these persons should no longer be excluded from the jury in capital cases." 45 N. Carolina Law Review, 1070, at 1076 (June, 1967). See also, Weihofen, *The Urge to Punish* (1956).

In McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania,* 30 Penn. B.A.Q. 250 (1959), it was said, "The end result [of a death qualified jury is that] in the most important criminal cases, to wit, murder, the jury consists of hard headed, conservative people, and, in effect, the defense must prove its innocence beyond all doubt. The necessity of the Commonwealth proving guilt

beyond a reasonable doubt is virtually abolished." 30 Penn. B.A.Q. at 258-259.

Introduced in the instant case of *Bumper* v. *No. Carolina*, No. 1016, was an affidavit containing the results of two relevant studies by psychologists, confirming that people not opposed to capital punishment are more likely to be partial to the prosecution on the issue of guilt or innocence than are people opposed to capital punishment. The prejudice of the death qualified jury is particularly invidious because it is unlikely that the jurors conscientiously realize they are biased to the prosecution.

The purpose of a jury of one's peers, representative of the community, is to keep contact between the people of the community and the law. "Qualifying" a jury on the death penalty prevents the community conscience from coming to bear on the *guilt* issue in capital cases. The result of a death "qualified" jury is that the *minority* point of view in the community is imposed in the trial. The result is that the extremists of the community are on the jury—those least in touch with modern ideas of criminal motivation and with the least dedication to human charity and understanding.

If a State deems it necessary that an impartial jury decide whether or not capital punishment should be imposed in a particular case, a bifurcated trial might be used. In a capital case, one jury, from which persons opposed to capital punishment would not be excluded, could decide the issue of the defendant's guilt or innocence, thus assuring a fair trial on that issue. A second jury, "qualified" on the death sentence, could decide the issue of punishment. California and New York already have provision for bifurcated trials. Cal. Penal Code § 190.1; N.Y. Penal Code § 1045-A.

II. Because "The Very Integrity Of The Fact-Finding Process" Is Involved When A Jury Is "Qualified" On The Death Sentence, The Unconstitutionality Of A State's Excluding From The Jury Persons Opposed To The Death Sentence Should Be Given Retroactive Effect.

Recent decisions of this Court concerning the retroactive application of a newly-discovered Constitutional rule have "concluded that retroactive application was justified because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent.' *Linkletter* v. *Walker,* 381 U.S. 639; *Tehan* v. *Shott,* 382 U.S. at 416 . . ." *Johnson* v. *New Jersey,* 384 U.S. 719, 728, 86 S.Ct. 1772 (1966), citing *Gideon* v. *Wainright,* 372 U.S. 335 (1963), *Jackson* v. *Denno,* 378 U.S. 368 (1964). In *Parker* v. *Gladden,* 385 U.S. 363, 87 S.Ct. 468 (1966), this Court held that the accused had been denied his Constitutional right to a trial by an impartial jury and his conviction was reversed when he was seeking post-conviction relief. Similarly, in *Irvin* v. *Dowd,* 366 U.S. 317 (1960), and in *Sheppard* v. *Maxwell,* 384 U.S. 333, (1966), this Court reversed convictions on petitions for writ of habeas corpus because in the trial in each of those cases the finder of the truth, the jury, was likely prejudiced against the defendant.

In the instant case of *Witherspoon* v. *Illinois,* No. 1015, "the very integrity of the fact-finding process" is involved, and there is "the clear danger of convicting the innocent." Unlike the cases at bar, *Linkletter* v. *Walker, supra, Tehan* v. *Shott, supra, Johnson* v. *New Jersey, supra,* and *Stovall* v. *Denno,* 388 U.S. 293, 87 S.Ct. 1967 (1967) did not involve "the core" of the constitutional right raised, 381 U.S. 630, nor were they involved with the unreliability of the finding of guilt. In *Linkletter, supra,* apparently the first case in

which this Court held a Constitutional ruling to be prospected only, 381 U.S. at 628, "the Court stressed that the prime purpose of the rule of *Mapp* v. *Ohio*, rejecting the doctrine of *Wolf* v. *Colorado*, as to the admissibility of unconstitutionally seized evidence, was 'to deter the lawless action of the police and to effectively enforce the Fourth Amendment.' 381 U.S. 637. There we could not 'say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved.' *Ibid.*" *Tehan* v. *Shott*, 382 U.S. at 413. In holding that *Griffin* v. *California*, 380 U.S. 609 (1965) should not be given retrospective application, this Court in *Tehan, supra*, said, ". . . the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of the judicial system . . ." 382 U.S., 415. In *Johnson* v. *New Jersey, supra*, involving the Constitutional right against coerced confessions, it was emphasized, ". . . the non-retroactivity of . . . [*Escobedo* v. *Illinois*, 378 U.S. 478 (1964), *Miranda* v. *Arizona*, 384 U.S. 436 (1966)] will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim." 384 U.S. 730. In *Johnson, supra*, the petitioners had already adjudicated the issue of the voluntariness of their confessions out of the presence of the jury, and, "In summation at the close of trial, defense counsel explicitly asserted that the confessions were truthful and pleaded for leniency on this ground." 384 U.S. 725. Finally, in *Stovall* v. *Denno, supra*, it was held that while the exclusionary rule set forth in *U.S.* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) was promotive of a fair trial, that rule ". . . undoubtedly will affect cases in which no

unfairness will be present,'' 388 U.S. 293, and thus did not require retroactive effect.

The instant cases involve ''the core'' of the Constitutional right to be tried before an impartial jury. As in *Sheppard* v. *Maxwell, supra, Irvin* v. *Dowd, supra, Parker* v. *Gladden, supra,* the reliability of the findings of guilt in these cases are suspect. Furthermore, as in *Sheppard* v. *Maxwell, supra,* the likelihood of unreliability in the finding of guilt because of the likelihood of prejudice in the jury should not require conclusive proof that the jury was prejudiced against the defendant.

It is true that, as in *Gideon* v. *Wainright, supra,* a holding for petitioner in *Witherspoon,* No. 1015, would result in the retrial of several cases. As in *Gideon* v. *Wainright, supra,* the interest of justice and the dangers of having convicted the innocent would require such a result. However, there are differences between the issue raised in *Witherspoon,* and that decided in *Gideon* which would make a holding for petitioner in *Witherspoon* less burdensome on the judicial system. In the first place, Gideon applied to all felony cases, a far larger number of cases than are involved in capital crimes. Secondly, one of the bases for the holding in *Gideon* was that the accused had been denied his right of effective confrontation of the evidence offered against him in his trial. Thus, in *Gideon* and in cases relying on *Gideon,* the retrial of the accused required that the prosecution present all of its evidence and witnesses anew. As much of the evidence had been lost, destroyed, or deteriorated, and as many witnesses were unavailable for retrial, the result in *Gideon* put some burden on the prosecution. Because *Witherspoon* does not involve the denial of the right to effective confrontation of testimony and other evidence *admitted into evidence in the court room,* there is no reason why on a retrial the prosecution, on proving that the witnesses or evidence offered in the earlier

trial are now unavailable, could not offer the transcript of the earlier trial as evidence. In this way, the burden on the prosecution would be greatly reduced, while the interests of justice would be satisfied.

Conclusion

For the foregoing reasons, I respectfully submit that this court hold in both of these cases that by the systematic exclusion from the jury of persons who were opposed to or had conscientious scruples against capital punishment, the defendants were deprived of a jury which fairly represented a cross section of the community, and assured the prosecution of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

I therefore respectfully urge that this court reverse the decisions below in these cases.

F. Lee Bailey, *Attorney*
Amicus Curiae
40 Court Street
Boston, Massachusetts
Feb. 26, 1968

Certificate of Service

I, F. Lee Bailey, Esq., 40 Court Street, Boston, Massachusetts, hereby certify that I have air mailed, postage prepaid, pursuant to Rule 33(1) Rules of the Supreme Court of the United States, this brief to the counsel of record in the above entitled cases, this day of February, 1968.

F. Lee Bailey

SUPREME COURT, U. S.

FILED

APR 1 1968

JOHN F. DAVIS, CLERK

NO. 1015

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM C. WITHERSPOON,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,
Respondents.

BRIEF OF AMICUS CURIAE, OSCAR TURNER

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TO THE HONORABLE JUSTICES OF SAID COURT:

THE INTEREST OF THE AMICUS CURIAE, OSCAR TURNER

The Amicus Curiae, Oscar Turner is vitally interested in the case of Witherspoon vs. Illinois because a judgment favorable to the Petitioner Witherspoon will necessarily result in a reversal of the death penalty judgment which has heretofore been adjudged against the Amicus Curiae in the 54th District Court of McLennan County, Texas. Your Amicus Curiae was there convicted and adjudged the death penalty on January 24, 1968, as the result of a verdict

by a jury selected, over the Amicus Curiae's objections, by a selection procedure which eliminated as eligible jurors all veniremen expressing conscientious scruples against the imposition of the death penalty, in response to questions by State's counsel. The two deceased victims, and the two allegedly wounded by Turner at the same time, were white.

The Amicus Curiae, Oscar Turner, is a Negro, and he was convicted of the murder of two white men and assessed the death penalty by an all white jury, designedly selected by the State to eliminate from the trial jury all Negroes. The death penalty disqualification under the facts and circumstances of the jury's selection was a significant and decisive instrument in this design. This design, and the trial and judgment resulting from this design, violates the Defendant's rights under the Constitution of the United States, Fifth Amendment, Sixth Amendment and Fourteenth Amendment, in that he was denied due process of law, and denied the trial by a fair and impartial jury, was denied the equal protection of the laws, and suffered discrimination by reason of his color.

Clearly the Amicus Curiae's position is relevant to the disposition of the main cause. If, as the Amicus Curiae contends, disqualification of veniremen because of conscientious scruples against the death penalty is an instrument which tends to produce all white jurors, then there are compelling

constitutional reasons for removing this discriminatory instrument from the employment of the prosecution in the selection of trial juries.

THE ARGUMENT

Because the death penalty challenge for cause tends to disqualify a markedly disproportionate percentage of Negro veniremen, prosecution counsel are thereby afforded a most effective instrument to aid a design of producing all white juries to try Negro defendants in capital cases.

We submit that Negro veniremen are far more likely to be disqualified on the death penalty challenge than are white veniremen.

Academic documentation of this view is thus far apparently relatively meagre.

Robert F. Crosson's Doctorial Dissertation, "An Investigation into Certain Personality Variables Among Capital Trial Jurors",[1] did support this view, although with a sample so small as hardly to be conclusive on this point.

Dr. Hans Zeisel's Treatise, "Some Insights into the Operation of Criminal

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[1] Western Reserve University, approved January 1, 1966.

Juries",[2] based upon interviews with 1,248 jurors after their term of service concluded that ethnic background appeared to provide the greatest differentiation of all broad classification criteria in determining excuses of jurors, and that, within the ethnic classification, "Negro, Italian and Slavic backgrounds assure a preponderance of excuses by the prosecution".

A national poll of some ten years ago reflected 78 percent of Negroes favored abolition of the death penalty, as compared with 50 percent of the white persons polled expressing the same view.[3]

In 1965 a Texas poll indicated 59 percent of all adult citizens in cities greater than 50,000 population (which included Waco, Texas, where your Amicus Curiae, Oscar Turner, was convicted) favored abolishing the death penalty.[4]

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[2]Reproduced in the Appendix, pp. 21 ff. (especially p. 36) to Appellants' Opening Brief, People of the State of California vs. Donald Floyd Ketchel and Thomas Edward Sears, Criminal No. 10905, in the Supreme Court of California.

[3]Roper & Associates Release February 9, 1958.

[4]Belden & Associates Release July 8, 1965.

Surely it is reasonable to suppose that today the national percentage of Negroes favoring abolition of the death penalty is substantially more than the 78 percent reported in 1958.

The proceedings in the trial (and pre-trial) of your Amicus Curiae affords positive clinical support of our argument.[5]

The prosecution in Oscar Turner's trial deliberately and successfully designed that the determination of Turner's guilt or innocence, and his sentence, would be within the jurisdiction of an all white jury.

When the pre-trial sanity hearing was conducted, all of the prosecution's six peremptory challenges were exercised against Negro veniremen, and the resulting jury, which found Turner sane, was all white.

After Turner's Motion In Limine, which protested the employment of challenges for

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[5] The record has not yet been prepared in State of Texas vs. Oscar Turner, No. 16,057, in The 54th District Court of McLennan County, Texas. By Affidavit in the Appendix to this Brief, counsel has affirmed and detailed relevant proceedings in the trial of State vs. Turner.

cause based upon conscientious scruples against the death penalty, was overruled, a trial jury was selected.

Forty-three Negroes were on the venire, of whom 36 or approximately 83.7 percent were successfully challenged for cause by the prosecution because of conscientious scruples against the death penalty. (A., par. 4b.)

Of the 88 white persons on the venire, 33 or 37.5 percent were challenged for the same cause. (A., par. 4b, 4g.)[6]

There were 3 Negroes qualified on the death penalty, who were challenged for causes properly available only to the Defendant. (A., par. 4d)

Four peremptory challenges were employed to excuse the remaining otherwise qualified Negroes. (A., par. 4c.)

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[6] This dramatically disproportionate ratio of Negro aversion to the death penalty may be understandable in the light of the statistics (introduced into evidence by Turner upon his Motion In Limine) demonstrating that over the past 40 odd years some 58 percent of the persons received by the Texas Department of Corrections [sic] for execution were Negroes, and some 66 percent of those actually executed were Negroes.

This is not all.

After the petit jury was selected, Turner moved to quash this jury panel, upon the grounds, inter alia, that the prosecution had designedly selected an all white jury, that the prosecution had deliberately eliminated, either by challenges for cause appropriate only for the defense, or by peremptory challenges, Negroes otherwise qualified, not only upon the death penalty, but by intellect and belief in social order.

In the course of the hearing upon the motion, Turner's counsel invited the prosecution to put on evidence (or simply to make a statement of disavowal) refuting the defense contentions in its motion, including the further contention that the prosecution would not designedly select an all Negro jury to try a white defendant accused of murdering a Negro.

The trial judge then invited the prosecution to comment.

There was none.

Accordingly, the State not having met its burden thus established, the design to eliminate Negroes from this jury must be accepted as a fact. Labat vs. Bennett, 365 F.2d 698 (5 Cir. 1966).

Because the State of Texas vs. Turner is not now itself sub judice in this Court, the establishment of this design is presented for its clinical significance.

We submit that this clinically significant design, supporting the admittedly small academic concurrence, logically suggest that this design is a constant potential, inherently productive of violation of the constitutional safeguards of a trial by a fair and impartial jury, of due process of law, and of the equal protection of the laws.

Labat vs. Bennett, supra, reversed convictions of Negroes on the basis of systematic exclusion of Negroes from jury service. This conclusion rested upon the very considerable disparity between the percentage of Negroes in Orleans Parish with the percentage of Negroes on the petit jury venires.

The State in Labat undertook to rebut the prima facie case the Court held was thus established by showing that the disproportion between the races on the jury panel resulted primarily from the "benign practice of excusing from jury service 'outside' workers, manual laborers, and earners paid daily wages, most of whom are Negroes". (P. 719). The State contended that these persons were excused because service on a jury would subject them to undue hardship.

The Fifth Circuit rejected this explanation, holding that the exclusion of daily

wage earners as a class violated due process and equal protection rights to an impartial jury representing a cross-section of the community. The Court specifically held that the exclusion of this large class, wage earners, "discriminates against Negroes in violation of the equal protection clause in that the class contains a disproportionately large number of Negroes". (P. 720). The Court in Labat went still further and said that the State's explanation for the small number of Negro jurors actually gave "rise to an inference of 'purposeful discrimination' on the part of the jury selection officials, within the legal sense of these words". (P. 726).

Surely we do not ask of this Court too much to assume (especially should there not be persuasive rebuttal by the State of Illinois or her associate amici curiae) that the clinical observations of State of Texas vs. Turner are generally valid with reference to the highly disproportionate rate of Negroes who can in any case be eliminated by the prosecution from the trial jury through employing the death penalty disqualification.

This Court appeared in Swain vs. Alabama, 380 U.S. 202, 13 L. Ed.2d 759 (1965) to indicate that a defendant could establish purposeful discrimination by a prosecution without eliciting "an admission from the prosecutor that discrimination accounted for his rejection of Negroes". (380 U.S. 227, 13 L. Ed.2d 776).

Of course, we believe that the record

in the Turner case reflects at least the prosecution's tacit admission that this was his purpose.

This Court in Whitus vs. Georgia, 385 U.S. 545, 17 L. Ed.2d 599 (1967), found under the system of jury selection there involved that "the opportunity for discrimination was present" (385 U.S. 552, 17 L. Ed.2d 605).

The death penalty disqualification provides a very real opportunity for discrimination, because it inherently lends itself to prosecution design to secure all white juries in capital cases involving Negro defendants, just as the elimination of day laborers in Labat indirectly produced discrimination against Negroes as jurors.

Witherspoon argues, persuasively we believe, that elimination of jurors because of conscientious scruples against the death penalty results in juries which are not a fair cross-section of the community.

The clinical record in State vs. Turner emphasizes the validity of Witherspoon's contention, and then goes on, acting through the logic of Labat vs. Bennett, to suggest the additional constitutional affront of inherent racial discrimination through its employment by the prosecution, even if there be no design

APPENDIX TO BRIEF OF
AMICUS CURIAE, OSCAR TURNER

AFFIDAVIT OF COUNSEL
RESPECTING TRIAL RECORD

1. I am Charles E. Wallace, together with Joel W. Westbrook, counsel appointed by the Court for Oscar Turner both for the trial and the appeal. I was personally present throughout all proceedings had in connection with the trial, and am able to state the following of my own knowledge and belief, as recorded by me.

2. In the case of State of Texas against Oscar Turner two completely separate trials were held. The first trial was solely on the issue of sanity. The second trial was on the issue of sanity and guilt or innocence.

3. Pretrial Sanity Hearing.

The pre-trial sanity hearing in Texas was treated the same as a civil case. The State and the Defense had six peremptory strikes each. Consequently, a jury was selected from the first 24 persons on the jury list that were qualified and had not been struck for cause. There were six Negro veniremen in the first 24 in the Turner case. The Defense used its six peremptory strikes on white persons. The State used its six strikes on the six Negro veniremen and, consequently, a 12 member all white jury was formed.

4. Trial on the Merits.

(a) In a capital case in Texas, the State and Defense each have 15 peremptory strikes.

(b) In the Turner case, 131 prospective jurors were questioned. Of this number, 69 individuals expressed conscientious scruples against the death penalty and were therefore challenged for cause by the State. This eliminated 52.7 percent of the venire. Out of the 131 prospective jurors questioned, 43 of these were Negroes. Of the 43, only 7 stated that they did not have conscientious scruples against the death penalty. Thirty-six of the Negroes expressed conscientious scruples against the death penalty for a total of 83.7 percent of the Negro group.

(c) On the 7 Negroes who expressed themselves as having no conscientious scruples, the State used four of its peremptory challenges.

(d) The other three Negroes were challenged for cause by the State for the following reasons:

(1) The failure of the Defendant to testify would lead the prospective juror to believe that the Defendant was guilty;

(2) The prospective juror believed that this Defendant was guilty;

(3) The prospective juror stated that he already had an opinion formed that the Defendant was guilty.

(e) In each of these three cases, the Defense waived these challenges for cause, as allowed by Article 35.16, Section 11, Texas Code of Criminal Procedure, and the State nonetheless successfully sustained these challenges.

(f) The State used 13 peremptory challenges which was the same number used by the Defense. Of the 13 State peremptory challenges, four were Negro males, six white females, and three white males.

(g) The following chart reflects the breakdown of the jury venire and indicates not only the difference between the opinions of whites and Negroes, but also the difference of opinion between males and females.

Group	No Conscientious Scruples	Conscientious Scruples	Percentage having Conscientious Scruples
White Male	39	20	33.9%
White Female	16	13	44.8%
Negro Male	6	20	76.9%
Negro Female	1	16	94.1%
Whites	55	33	37.5%
Negroes	7	36	83.7%
Males	45	40	47.1%
Females	17	29	63.0%

5. The assertions in the Brief of your Amicus Curiae respecting procedural events during the course of the trial in State vs. Turner are true and correct.

CHARLES E. WALLACE
Court Appointed Counsel for Defendant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, by the said Charles E. Wallace this day of , 1968.

Notary Public in and for McLennan County, Texas

SUPREME COURT, U.S.

In the Supreme Court of the United States

APR 12 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

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On Writ of Certiorari to the Supreme Court of Illinois

No. 1016

WAYNE DARNELL BUMPER, *Petitioner,*

vs.

STATE OF NORTH CAROLINA, *Respondent.*

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE ON BEHALF OF RESPONDENTS, JOINED BY THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA, WASHINGTON, AND WYOMING

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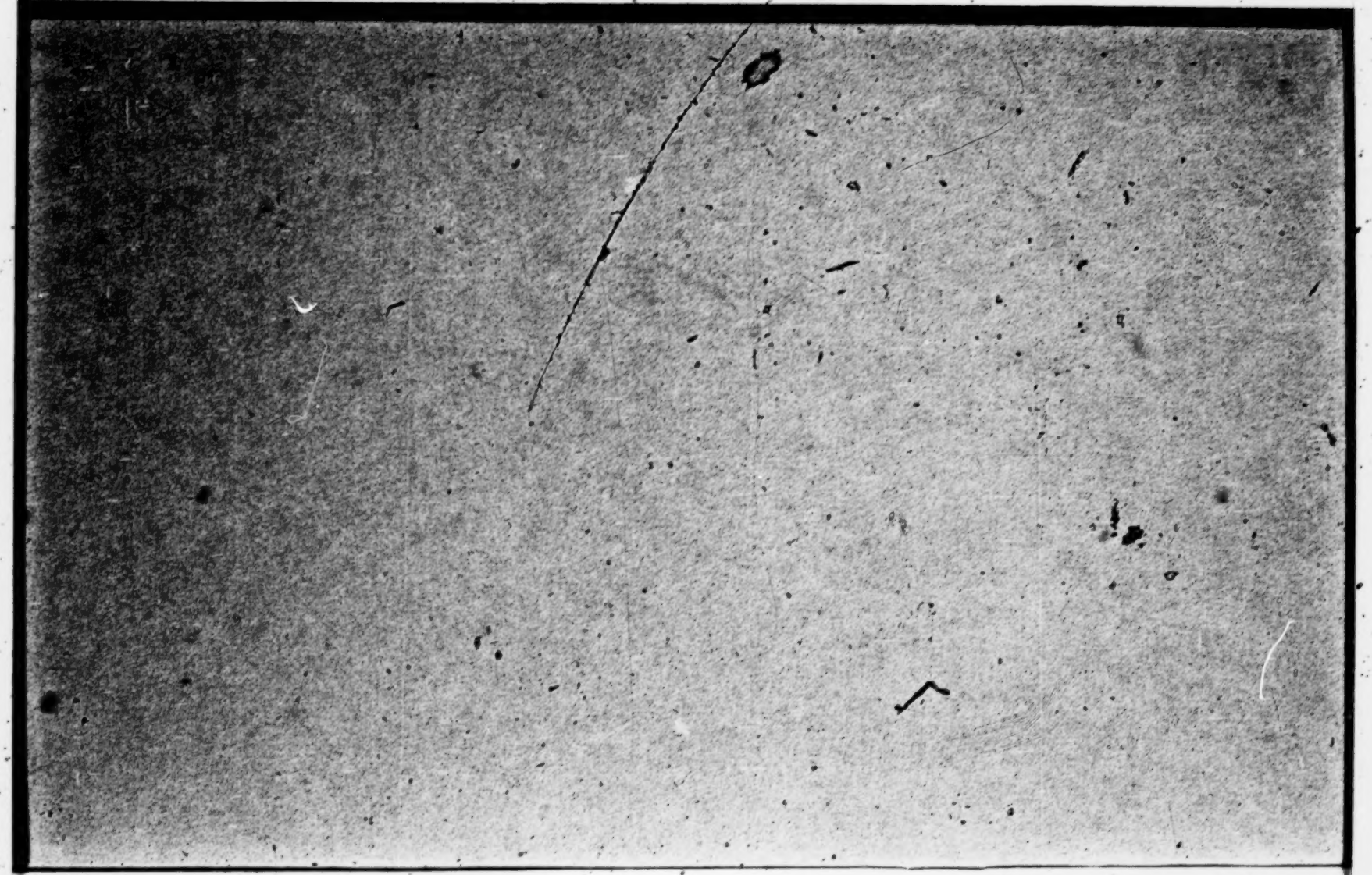

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INTEREST OF AMICUS CURIAE

In the instant cases, this Court has undertaken to review the constitutionality of the practice, nearly universal among states recognizing capital punishment, of disqualifying in capital cases prospective jurors who acknowledge bias against capital punishment. California excludes from capital juries those veniremen who swear that they cannot vote for a death sentence. The practice of the states joining California in this brief varies from the California practice, if at all, only in the nature or degree of bias against the death penalty which state law requires be entertained by a prospective juror to warrant his exclusion for cause from a capital jury.

The California procedure has been employed in the trials of all or virtually all of those of the state's 75 condemned men whose guilt was determined by a jury, as well as in the trials of several hundred other California prisoners charged with capital offenses who received sentences other than death. The practice has been deemed by the state, and so recognized by the courts of the state, as essential for the meaningful administration of the laws providing for the death penalty. Each of the states joining California in this brief is in a position to assert a state interest similar to that of California.

A ruling by this Court sustaining, in whole or in part, the position of petitioners, could profoundly affect the future conduct of capital trials in California and the supporting states, either by making it impossible to obtain death sentences or by injecting an unconscionable caprice into capital sentencing. If such a ruling were given retrospective application, it would have a chaotic effect on the

administration of justice in these states. Our interest in maintaining procedures which make possible the carrying out of deep-rooted state policies, and in avoiding the disruption of the administration of justice, brings The People of the State of California, and the states joining us, before this Honorable Court as *amici curiae*.

SUMMARY OF ARGUMENT

The Equal Protection and Due Process Clauses of the Fourteenth Amendment, insofar as they control the selection of juries, permit exclusions of prospective jurors when such exclusions have a rational basis. The due process guarantee of a fair and impartial jury assures only that a defendant in a criminal prosecution be tried by a jury which has no bias or prejudice preventing it from rendering a verdict according to the law and the evidence. When a jury has been impanelled without arbitrary exclusions, for cause, having been permitted, and the jury contains no member found to be biased against the defendant, the requirements of the Constitution have been met. No inquiry is required into the question of whether a jury from which rational exclusions have been made may be more likely to convict than one from which such exclusions have not been made.

The constitutional decisions of this Court have recognized and approved a wide variety of rational bases for disqualification of potential jurors. These include determinations that certain persons are unqualified to sit on any jury, and determinations that certain others are un-

qualified to sit on juries in particular cases, principally because of bias. Bias against one of the penalties which a jury has discretion to impose is a rational and therefore constitutional basis for exclusion from a jury whose decisions that bias may affect. Thus, a bias against the death penalty is a rational basis for excluding from a jury deciding a capital case a prospective juror holding such a bias. This is true whether the juror's hostility toward capital punishment constitutes merely "implied bias," which would not necessarily preclude him from imposing a death sentence, or "actual bias," which would so preclude him.

The core of petitioners' argument is the factual assertion that juries from which persons biased against the death penalty have been excluded is more likely to convict than one from which such persons have not been excluded. Our position is that demonstration of the truthfulness of this assertion would not entitle petitioners to relief. But we must also note that petitioners have failed utterly to sustain their burden of proof upon this very factual question.

Should this Court, nonetheless, find any sort of constitutional infirmity in the practices of Illinois and North Carolina, we strongly urge that any ruling invalidating such practices be given prospective application only. Petitioners' claim is that a jury from which persons biased against the death penalty have been excluded is unfair to the defendant on the issue of guilt. This claim could obviously be made by anyone convicted of any offense by such a jury, regardless of whether he received the death penalty. No rational basis appears for distinguishing the

condemned from other felons and honoring the "unfair jury" claim only if made by the former. And a retrospective application of the rule contended for by petitioners would necessitate thousands of retrials throughout the nation (not to mention the outright release of a necessary, though hopefully small, number of convicted murderers who cannot be retried), thus working an intolerably chaotic effect upon the administration of justice. Under the most recent prospectivity standard enunciated by this Court, limitation to prospective application only of any new ruling is clearly called for.

ARGUMENT

I

THERE IS NO CONSTITUTIONAL INFIRMITY IN THE PRACTICE, FOLLOWED BY ALL FEDERAL AND NEARLY ALL STATE COURTS, OF EXCLUDING FROM JURIES TRYING CAPITAL CASES THOSE PERSONS WHO PROFESS, UNDER OATH, A BIAS AGAINST CAPITAL PUNISHMENT.

A. The Fourteenth Amendment Does Not Prohibit Jury Exclusions Having a Rational Purpose.

We understand petitioners to present essentially two arguments: (1) the exclusion for cause, from the juries which tried petitioners, of persons who professed bias against capital punishment denied petitioners equal protection of the laws, in that it amounted to the exclusion of an identifiable group of persons and thus deprived petitioners of their right to be tried by a jury drawn from a cross-section of the community; and (2) the juries which tried petitioners were more likely to convict because of such exclusions, thus denying them due process.

Both these arguments "misconceive the scope of the right to an impartially selected jury assured by the Fourteenth Amendment." *Hoyt v. Florida,* 358 U.S. 57, 59 (1961). That right "requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service untrammeled by any arbitrary and systematic exclusions." *Ibid.* The foregoing language pithily summarizes the extent of the operation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment upon the area of jury selection. To restate the principle in a form more pertinent to the precise question before this Court in the instant cases, equal protection requires only that no arbitrary exclusions from juries be made (other than by peremptory challenge) and conversely, no jury exclusion denies equal protection if it has a rational basis. The right to trial by an impartial jury means only a right to be tried "by jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors v. United States,* 158 U.S. 408, 413 (1895). Therefore, where an individual has been tried by a jury from which only exclusions having a rational basis have been made, and no juror can be shown to harbor the kind of bias or prejudice contemplated by *Connors,* he can make no complaint of unconstitutional jury exclusion. There is no need to inquire whether the jury which tried him was, or may have been, more likely to convict than would have been a jury from which the exclusions having a rational basis had not been made.

The proposition that a defendant is entitled to be tried by a jury drawn from a panel representing a "cross-

section of the community" merely embodies the principle that there must be no systematic exclusion from juries of any identifiable group on arbitrary grounds. Thus, it is arbitrary and irrational systematically to exclude jurors on the basis of race, *Smith v. Texas,* 311 U.S. 128 (1940), ancestry or ethnic affiliation, *Hernandez v. Texas,* 347 U.S. 475 (1954), religion, *Schowgurow v. State,* 240 Md. 121, 213 A.2d 475 (1965); *Juarez v. State,* 102 Tex. Cr. 297, 277 S.W. 1091 (1925), or status as a day laborer, *Thiel v. Southern Pacific Co.,* 328 U.S. 217 (1946). For that matter, it is irrational deliberately to *include* members of a particular race in a jury panel. *Collins v. Walker,* 335 F.2d 417 (5th Cir.), *cert. denied,* 379 U.S. 901 (1964), *noted in* 78 HARV. L. REV. 1568 (1965) *and* 74 YALE L. J. 919 (1965).

The principle was made clear by the Chief Justice, in discussing impermissible bases of jury exclusion:

> "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment *not based on some reasonable classification,* the guarantees of the Constitution have been violated." *Hernandez v. Texas, supra,* 347 U.S. at 478. (Emphasis added.)

The meaning of requirement that juries be drawn from "a cross-section of the community" can be fully understood only by examining the numerous permissible exclusionary practices which have the effect of removing huge segments of the community from the jury lists, or from particular juries. This examination will also lay to rest petitioners' argument that exclusionary practices

cannot properly bar from juries those most sympathetic to a particular class of defendants.

All jurisdictions exclude substantial segments of the community from any jury by establishing minimum qualifications for jury service. No one doubts that these qualifications, at least in the main, are constitutional. This Court has specifically approved those qualifications obtaining in New York state in 1947:

> "To qualify as a juror, a person must be an American citizen and a resident of the county; not less than 21 nor more than 70 years old; the owner or spouse of an owner of property of the value of $250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or a misdemeanor involving moral turpitude; intelligent; of sound mind and good character; well-informed; able to read and write the English language understandingly." *Fay v. New York*, 332 U.S. 261, 266-67 (1947).

In addition, de facto exclusion results from the common, if not universal, state practice of allowing occupational exemptions from jury service. This Court has recognized and approved the following classes of exempt occupations:

> "[C]lergymen, physicians, dentists, pharmacists, embalmers, optometrists, attorneys, members of the Army, Navy or Marine Corps, or of the National Guard or Naval Militia, firemen, policemen, ship's officers, pilots, editors, editorial writers, subeditors, reporters and copy readers." *Id.* at 267.

Clearly, the residuum of prospective jurors available for service after the operation of qualification and ex-

emption statutes such as the above constitutes something other than a "cross-section of the community." Just as clearly, however, such statutes are constitutional because they employ rational bases for jury exclusions. The qualifications required by these statutes are obviously related reasonably to the end of securing competent jurors or, in the case of citizenship qualifications, of absolving from the obligations of citizenship those who do not enjoy its rights. The exemption statutes represent rational legislative judgments that the exempted classes can serve society better by pursuing their occupations than by serving as jurors.

It is doubtful at best that the classes statutorily excluded by such qualification and exemption statutes are no more sympathetic than the community at large to defendants in criminal prosecutions. We submit that it is by no means unlikely that one or more of the excluded classes, such as clergymen, are peculiarly able to judge compassionately the individual accused of crime. And it is quite likely that particular defendants could benefit by the presence on a jury trying them of members of one or more of the excluded classes. Perhaps the largest excluded class, which approaches a majority in some communities, is that of minors. It is widely known that the bulk of anti-conscription sentiment throughout the nation is concentrated in the country's youth, particularly those under 21. Yet the young man accused of violating the selective-service laws is tried by a jury bereft of minors. No one would contend that he may successfully claim unconstitutional jury exclusion; the right to be tried by a jury of one's peers does not, after all, contemplate trial

by a jury composed in part of members of one's "peer group."

The foregoing demonstrates that substantial segments of the community can constitutionally be, and are, excluded even from jury *panels* without consideration of whether defendants, in general or in particular, are by virtue of such exclusions tried by juries bereft of members of the community most favorable to defendants' positions.[1] There is another group of permissible exclusions from individual juries which necessarily results in barring from the juries those most likely to vote in favor of defendant. This is the group of exclusions for bias, particularly bias against the law which defendant is charged with violating, or against the mandatory or permissible penalties for such violation.

To cite but a few examples, courts have sustained challenges for cause to veniremen on account of bias of the following varieties: bias against severity of penalty for a particular offense, *Carr v. State,* 216 P.2d 333 (Okla. Crim. 1950); *McClure v. State,* 103 Tex. Cr. 158, 280 S.W.

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[1]"The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn. Chance governs the next step. The panel drawn by lot may or may not be a cross-section of the community." *Turberville v. United States,* 303 F.2d 411, 419 (D.C. Cir.), *cert. denied,* 370 U.S. 946 (1962). Under the foregoing view, the "cross-section" rule has no application to exclusions of individual jurors on voir dire examination after the panels are drawn. This view is confirmed by the cases, none of which, according to our research, has applied the "cross-section" rule beyond the point at which the panels are chosen. We suggest, therefore, that discussion of the "cross-section" doctrine in connection with the practice of allowing challenges of individual jurors for cause is at best irrelevant and at worst confusing, in that no one has contended that a given *jury* must be composed of a cross-section of the community.

784 (1926) (penalty for liquor law violation); *State v. Curtis,* 108 Kan. 537, 196 Pac. 445 (1921) (penalty for rape); scruples against imposition of penitentiary sentences, *Stalls v. State,* 28 Ala. 25 (1856); bias against imposition of any punishment for certain crimes, *State v. Normandale,* 154 La. 523, 97 So. 798 (1923) (statutory rape); bias against considering informer or accomplice testimony, *State v. Flint,* 60 Vt. 304, 14 Atl. 178 (1898), or convicting on circumstantial evidence, *People v. Ah Chung,* 54 Cal. 398 (1880); and refusal to apply the felony-murder rule, *State v. Bunk,* 4 N.J. 461, 73 A.2d 249 (1950), or to hold an accomplice liable to the same degree as an actual perpetrator, *Commonwealth v. Bentley,* 287 Pa. 539, 135 Atl. 310 (1926). Needless to say, a defendant has a correlative right to exclude from his jury any person who admits a prejudice against a particular defense upon which the accused may wish to rely. See, *e.g., Jones v. State,* 60 Tex. Cr. 139, 131 S.W. 572 (1910) (defense of mental incapacity or insanity); *Webb v. Commonwealth,* 314 S.W.2d 543 (Ky. 1958) (self-defense).

The principle that biased jurors may be excluded can be no less valid even if bias pervades a community. Thus, in *Miles v. United States,* 103 U.S. 304 (1888), and *Reynolds v. United States,* 98 U.S. 145 (1878), this Court upheld the challenges, for cause, in bigamy trials in Utah of those who stated a belief that polygamy was divinely commanded. It is a matter of common historical knowledge that in the Utah Territory of 90 years ago, a majority of the populace consisted of practitioners of a religion which did indeed then hold polygamy to be di-

vinely commanded, and would thus be biased in favor of the bigamist.

Postbellum Texas affords another illustration of the principle that widespread community bias in favor of a defendant is not sufficient to justify inclusion on a jury of persons holding that bias. Thus, in *Lester v. State*, 2 Tex. App. 432 (1877), a white man convicted of murdering a Negro claimed error in permitting the prosecutor to ask prospective jurors if they would as readily convict as if the victim had been white. The defendant, on appeal, "gravely" stated that since he was a white man and a Democrat, and the deceased a Negro and therefore a Republican, and since the jurors were required to swear that they regarded a Negro as highly as a white man, defendant was forced to trial by a jury of his "political enemies." The court, with undisguised revulsion, disposed of this argument by declaring that a venireman who would not regard with equal seriousness the murders of a white man and a Negro was biased and unfit to be a juror.

A contemporary example is provided by the current prosecutions for violations of the Civil Rights Act. In some communities there may be widespread antipathy toward the victims of such violations, the attorneys who prosecute such violations, and the Act itself. While there are no reported cases, we would be astounded to discover (1) that Justice Department attorneys conducting such prosecutions have failed to question prospective jurors with a view toward excluding for cause those biased against the prosecution or (2) that this Court, or any other federal reviewing court, would broadly dis-

approve such questions or challenges. Yet the jury which remains after such challenges are exercised is unquestionably more "prosecution prone" than it would have been absent such challenges.

The foregoing adequately refutes the contention that persons biased against particular laws or their enforcement, including laws providing for the death penalty, should be allowed to serve on juries, on the theory that one of the jury's functions is the nullification, through non-enforcement, of unpopular laws. This argument confuses the jury's power with its proper function, and betrays on the part of its proponents a preference for a government of men over a government of laws. Juries have the undoubted power to refuse to enforce any law or legal principle of which they may disapprove, and when a jury is composed in whole or in part of persons who are less than candid, on voir dire examination, in admitting their biases, nothing can be done about their irresponsible exercise of this power. But the law has never encouraged, and should never encourage, such jury lawlessness by seating jurors who frankly admit they will not enforce the law allegedly violated in a particular case. The proper body to repeal unpopular laws is not the jury, but the body which enacts such laws. This principle applies with special force to laws which are generally accepted but locally unpopular. It is one of the tragedies of our times that irresponsible juries can render powerless the efforts of law enforcement officers to protect the very lives of those seeking to exercise fundamental constitutional rights in localities where their exercise in a particular way by particular persons is discouraged by violence.

B. Bias Against the Death Penalty, at Least Where Such Bias Would Preclude its Holder from Imposing a Death Sentence, is a Rational, and Therefore Constitutional, Basis for Excluding Veniremen from a Jury in a Capital Case.

If we may consider it established that a venireman who acknowledges bias on an issue to be placed before a jury may constitutionally be excluded from that jury, even though his absence may render the jury more prone to reach a certain result than it would be were he on it, we think it plain that bias against the death penalty represents a perfectly constitutional ground for exclusion of a juror who, in the event of a guilty verdict, will be required to consider whether to impose the death penalty. This is particularly true where his bias is so profound as, by his own admission, to preclude him altogether from concurring in a death verdict.

Federal law, at least in the District of Columbia, permits jury exclusion in capital cases not on the basis of a venireman's mere opposition to capital punishment, but only if his opposition would prevent him from rendering a fair verdict on the basis of the evidence. *Turberville v. United States,* 303 F.2d 411, 421 (D.C. Cir.), *cert. denied,* 370 U.S. 946 (1962). See also *Long v. United States,* 360 F.2d 829, 834 (D.C. Cir. 1966), for an application of this test. California employs a similar test, disqualifying only those jurors whose consciences would preclude them from returning a death penalty verdict. See *People v. Bandhauer,* 66 Cal.2d 524, 531, 426 P.2d 900, 905, 58 Cal. Rptr. 332, 337 (1967); *People v. Mitchell,* 61 Cal.2d 353, 365, 392 P.2d 526, 534, 38 Cal. Rptr. 726, 734 (1964); *People v. Wein,* 50 Cal.2d 383, 394, 326 P.2d 457, 463 (1958). The California distinction is by no means of recent vintage. In

People v. Stewart, 7 Cal. 140 (1857) the California Supreme Court reversed a conviction on the ground that a juror had been excused for cause when he answered that he was "opposed to capital punishment on principle." The court distinguished between opposition on principle and conscientious opposition. Not only was the latter the only ground for challenge under the statute, but the two meant quite different things: principle might yield to rational argument; conscience cannot. Therefore, "a man may be opposed on principle to what he conscientiously believes to be right," *id.* at 143, and, conversely, may ignore his principles but not his conscience.

Some other jurisdictions, probably a minority, take substantially the same position as California and the District of Columbia. We will not attempt to identify each of these jurisdictions because the law in a particular state is not always clear. However, some examples of state rules which appear to be in accord with the California view may be found in Annot., 48 A.L.R.2d 560, 574-76 (1956).

We submit that the constitutionality of the California rule cannot seriously be questioned. Veniremen who swear that they would not concur in a death verdict are simply incapable of fairly deciding the question of penalty. They are unable to perform the duty imposed on a jury which has found an accused guilty of a capital offense—that is, to decide whether life imprisonment or death is the proper penalty. They have prejudged the case. In short, they harbor actual bias.

Opponents of the practice of disqualifying from capital juries those who are so opposed to the death penalty that

they could never impose it are forced to concede two general propositions: (1) biased jurors should not be seated, and (2) veniremen who cannot impose the death penalty are, in capital cases, biased. They contend, nonetheless, that bias against the death penalty does not provide a constitutionally sufficient basis for jury disqualification in capital cases. What are the arguments made in support of this contention?

It is first claimed that the state has no legitimate interest in seeking the death penalty. Since very few executions have occurred in recent years, it is argued there is only a remote chance of obtaining a death sentence. We cannot deny the paucity of executions during the years 1965 through 1967 inclusive (there have been ten). However, it does not follow that the practice of imposing death sentences has significantly declined during the same period, or that the recent sharp drop in the number of executions is anything but a temporary phenomenon. The only explanation we have found for the low execution rates of recent years is an increased willingness on the part of the courts to grant stays of executions. These stays have very rarely led to the vacating of any death sentences. The stays are uniformly temporary and we have confidence that they will, in nearly all cases, be vacated so as to allow the law to take its course. In the meantime, courts continue to impose death sentences at an apparently undiminished rate, and few persons are relieved of such sentences by executive clemency. Thus there are currently 75 persons under sentence of death in California, up from 62 on April 1, 1967. Since that date there have been one execution and one gubernatorial

commutation. We understand that there are more than 400 persons awaiting execution throughout the nation. While reversals of death sentences on direct appeal are not infrequent, at least in California, a substantial majority of those obtaining such reversals suffer reimposition of sentences of death. It therefore cannot seriously be contended that the imposition and ultimate execution of a sentence of death is so rarely the result of a capital trial as to warrant the conclusion that the state has no legitimate interest in seeking such a result.

A related argument is that the state has no legitimate interest in seeking the death penalty because society is adequately protected by imprisonment of the murderer. This overlooks the fact that Congress and the legislatures or electorates of 37 states have determined that adequate protection of society requires the existence of the death penalty for murder and, in some cases, other crimes. This judgment, we respectfully submit, is not one which governmental bodies are constitutionally forbidden to make. This argument typifies the approach taken in the brief of certain *amici*, which go far beyond the common issue presented in the instant cases and mount an attack upon the death penalty as unconstitutional *per se*. Though this Court declined to consider in these proceedings the question of the death penalty's constitutional validity, *amici* persist in inviting this Court to abolish capital punishment indirectly, by holding that it serves no legitimate governmental interest and thus does not justify measures which the federal and state governments have employed to make its imposition possible. We strongly urge this Court to reject the invitation. If the death penalty is

unconstitutional (and we would be happy to address ourselves to the question of its constitutionality should this Court ever deem the question sufficiently substantial to deserve consideration), it should be so held. If not, the question of whether to abolish capital punishment should be decided where it has always been decided—in the legislative halls and polling places of the nation. Men of reason and integrity cannot stomach the hypocrisy of judicial abolition by indirection.

It is next claimed that potential jurors should be allowed to serve on capital juries notwithstanding their inability to impose the death penalty, because they can fulfill their function under the law. It is reasoned that since—with but very few exceptions—state law does not require a jury to impose a death sentence, but merely places the choice of penalty in the jury's discretion, a juror can do what the law requires by exercising his discretion in favor of a life sentence. A juror unable to vote for the death penalty is thus claimed not to be in the position of a juror whose scruples prevent him from convicting under any circumstances, since the former can "follow the law" while giving his bias full rein. But this argument distorts the meaning of "discretion." As Chief Justice (then Associate Justice) Traynor put it, the discretion contemplated by California law is a discretion based on the evidence presented at trial, and not "the unswerving application of principles formulated before trial." *People v. Riser,* 47 Cal.2d 566, 575, 305 P.2d 1, 7 (1956). Thus, one who cannot impose the death penalty cannot "follow the law" (at least in California, and we would be surprised if a different result obtained in other

states), for he cannot exercise "'discretion'' as the law defines the term.

Finally, it is claimed that state and federal courts alike are required to adopt a "two-trial'' system in capital cases, with the issues of guilt and penalty decided by two different juries, and with persons unable to impose capital punishment excluded only from the penalty jury. Our answer to this is threefold. First, a two-trial system with separate juries does not exist anywhere.[2] Second, it is by no means constitutionally required, see *Spencer v. Texas,* 385 U.S. 554, 568 (1967). Third, under such a hypothetical two-trial system, state and federal governments would be able to exclude from the guilt trial, as well as the penalty phase, those persons who cannot impose the death penalty. The reason is simple: such persons simply cannot be fair and impartial on the issue of guilt.

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[2]It has been asserted that California employs such a two-trial system. This assertion is misleading. California does provide (Cal. Pen. Code § 190.1) for a bifurcated trial whenever the death penalty may be imposed. If the jury finds the defendant guilty, a proceeding to determine penalty is commenced. But the statute expressly provides that "if the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty." *Ibid.* This section has been authoritatively construed as expressing a legislative preference for the same jury at both phases of the trial. *People v. Gonzales,* 66 Cal.2d 482, 499, 426 P.2d 929, 940, 58 Cal. Rptr. 361, 372 (1967). And we are aware of no instance under the California procedure where different juries have determined the issues of guilt and penalty, save in those cases where the California Supreme Court has reversed, as to penalty only, a judgment imposing a death sentence and a retrial has been limited to the issue of penalty. While other instances involving separate juries are conceivable under the California statute, it is certainly misleading to imply that they are commonplace or, indeed, have ever existed.

Scruples against the death penalty are commonly the result of a deep religious conviction or a profound philosophical commitment developed after much soul searching. The holders of such scruples must necessarily recoil from the prospect of making possible what they regard as immoral. The state or federal governments can reasonably conclude, we submit, that despite any protestations to the contrary, a person scrupled against the death penalty cannot objectively judge the issue of guilt when he knows that a finding of guilt would permit a judge or another jury to impose a sentence of death. Such a person must know that his responsibility for the resultant execution would be just as great as if he himself had concurred in a death verdict. See *People v. Ray,* 252 A.C.A. 1002, 1023, 61 Cal. Rptr. 1, 13 (1967).

The foregoing arguments are, we submit, manifestly insufficient to remove the practice of disqualifying from capital juries those unable to impose the death penalty from the operation of the principle that bias is a constitutionally permissible ground for jury disqualification.

We have earlier discussed the California rule, which requires as a prerequisite to jury disqualification in capital cases an absolute inability to render a death penalty verdict. Whether the actual voir dire examinations in the instant cases were sufficient to meet that requirement or, if not, whether any defect was waived by failure to object at trial to the allowance of challenges for cause improper under local law, is a question we will gladly leave to the parties. But even if this Court should find some constitutional infirmity in the allowance of the particular challenges in these cases, we respectfully urge

that any new constitutional doctrine which this Court might choose to adopt should go no further than to require the federal and state courts to allow challenges for cause to capital jurors on account of their death-penalty views only if their views would preclude them from imposing the death penalty.

C. Mere Opposition to Capital Punishment Demonstrates Implied Bias and thus is a Constitutionally Sufficient Ground for Disqualification of Jurors in Capital Cases.

It has been suggested that this Court should adopt a constitutional rule permitting jury disqualifications in capital cases only where a prospective juror's views would preclude him from imposing a death sentence. Under such a test, mere opposition to the death penalty would not be grounds for disqualification, so long as the prospective juror swore he could set aside his opposition and return a death verdict in a proper case. The State of California, as *amicus curiae,* is in a difficult position with respect to this suggestion, since it calls, in effect, for the adoption of the California rule, and its adoption would thus not significantly alter the California practice. However, we cannot say that all states joining California in the instant brief employ rules similar to that of California. In deference to those states which do not, and because we believe that the California rule does not rise to the level of a constitutional requisite, we submit that the Constitution does not forbid disqualification of prospective capital jurors on grounds of mere opposition to the death penalty.

Bias against capital punishment which is of such a nature as utterly to preclude its holder from concurring

in a death verdict has been shown to constitute actual bias. But actual bias is not the only type of bias historically recognized as sufficient to disqualify a prospective juror. The common law, as well as particular statutes, have always recognized "implied bias" as a ground for challenge. Implied bias is bias conclusively presumed in law to arise from the existence of some fact which can be reasonably assumed to give rise to actual bias. When grounds for challenge on account of implied bias are enumerated by statute, they usually consist of blood or specific types of social relationships between a venireman and the accused, the complainant, or the victim. They also commonly include, in capital cases, scruples against the death penalty. A typical American statute is California Penal Code section 1074.

We have found no case in which this Court has struck down challenges for cause pursuant to any traditional ground of implied bias. Such grounds do, after all, reasonably give rise to an inference of actual bias. We cannot imagine this Court denying the right of the People, in a criminal case, to challenge for cause a prospective juror who happens to be the accused's brother, attorney, or employee, even if he swears that he could disregard his relationship to the defendant and try the case fairly.

The federal courts have recognized that conduct or beliefs, as well as relationship to the accused, complainant, or victim, can properly constitute a ground for challenge on account of implied bias. Thus, in *Shettel v. United States,* 113 F.2d 34 (D.C. Cir. 1940), and *Smith v. United States,* 112 F.2d 217 (D.C. Cir.), *cert. denied,* 311 U.S. 663 (1940), it was held proper, in a "numbers" prosecution,

to excuse for cause prospective jurors who stated that they had played numbers within the previous two years. And in *Reynolds v. United States*, 98 U.S. 145, 157 (1878), this Court upheld challenges for cause, in a bigamy prosecution, of prospective jurors who had been living in polygamy, without finding it necessary to determine whether the challenges were properly taken for "principal cause" (*i.e.*, implied bias) or for "favor" (*i.e.*, actual bias; see 31 AM. JUR. *Jury* § 158).

We submit that bias against the death penalty, regardless of whether it is of such a nature as to preclude its holder from concurring in a death verdict, constitutes implied bias and is therefore a constitutionally permissible basis for disqualification, in a capital case, of a prospective juror who entertains it. A belief that capital punishment is morally wrong is normally founded upon conscience, principle, or both. And conscience and principle profoundly motivate men. One whose conscience or principles would be offended by the imposition of a particular penalty can hardly be considered impartial on the question of whether such a penalty should be imposed, regardless of any protestations he may make to the effect that he could lay aside his beliefs and act objectively. Thus viewed, mere opposition to the death penalty presents a rational basis for disqualifying a juror in a capital case and therefore meets the constitutional requirements discussed *supra*.

To quote from *Fay v. New York*, 332 U.S. 261 (1947), "Society . . . has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury." *Id.* at 288-89. We respectfully sub-

mit that a defendant in a capital case who claims the right not to have excluded from the jury trying him those persons who admit a bias against the death penalty asserts nothing less than the "right to friends on the jury."

D. Petitioners Have Utterly Failed to Sustain their Burden of Proving that Juries from which Persons Biased Against the Death Penalty have been Excluded are More Likely to Convict than Those from which such Persons Have Not Been Excluded.

The core of petitioners' argument is the factual assertion, in the language of the Question upon which certiorari was granted in *Witherspoon*, No. 1015, that "the operation of the . . . statute providing that the state could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment . . . assured the state of a jury whose members were partial to the prosecution . . ." While we strongly urge that the truthfulness of this assertion is irrelevant to the constitutional issues before this Court, we must note that petitioners have utterly failed to sustain their burden of proving the assertion. It may be that such a claim is not even susceptible of proof. Courts have refused to take judicial notice of this claim. *See, e.g., Turberville v. United States*, 303 F.2d 411, 420-21 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962).

The records before this Court, as *amici* LDF-NORI implicitly acknowledge, see pp. 61-62 of their brief, are wholly insufficient to support petitioners' claims. We had contemplated the preparation of a specific and detailed analysis of each of the studies cited in petitioners' briefs,

and a demonstration of the failure of any or all of them to support petitioners' factual claims. However, we understand that an excellent dissertation covering the same ground will be presented in the briefs of respondents in *Witherspoon*, No. 1015. Rather than to bore the Court with a repetition of the same material, we shall rely on respondents' discussion of this point.

II

SHOULD THIS COURT ADOPT A NEW CONSTITUTIONAL RULE GOVERNING THE EXCLUSION OF POTENTIAL JURORS IN CAPITAL CASES ON ACCOUNT OF THEIR BIAS AGAINST THE DEATH PENALTY, SUCH A RULE SHOULD BE GIVEN PROSPECTIVE APPLICATION ONLY.

Our fundamental position, of course, is that there is no constitutional infirmity in the practices of state and federal courts which exclude from capital juries those biased against capital punishment, particularly where their bias is so profound as utterly to preclude them from imposing a death sentence. But should our position be rejected, in whole or in part, we strongly urge this Court to give prospective application only to any new constitutional ruling in this area.

This Court recently set forth the criteria guiding resolution of the question of whether to give retrospective application to a newly-announced constitutional doctrine relating to criminal procedure. These criteria are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on

the old standards, and (c), the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno,* 388 U.S. 293, 297 (1967). Application of these criteria, we submit, clearly calls for prospective application only of any new standards in the area of jury exclusion.

Should new standards be adopted, we can at this stage only speculate about "the purpose to be served by these new standards." It has been suggested that this Court rest its hypothetical ruling on the proposition that jurors biased against the death penalty constitute an identifiable segment of the community which cannot constitutionally be excluded, as a class, from any jury. This approach would find unnecessary the determination of whether the exclusion of such jurors renders capital juries less inclined to acquit. In view of the extremely weak case made by petitioners for the proposition the juries from which persons biased against the death penalty have been excluded tend to be "prosecution prone," such an approach would at least have the virtue of not having to rest upon factual foundation no more solid than a soap bubble (though it would be equally bereft of a foundation in legal theory). Should this Court prefer such an approach to one based on unproven factual assertions, the purpose of the new standards would be merely to make jury selection processes less exclusive, rather than to end a practice affecting the reliability of the guilt-determining process. Since enhancement of the integrity of the fact-finding process is the only factor which militates in favor of retrospective application of any constitutional ruling, see *Linkletter v. Walker,* 381 U.S. 618 (1965), the "iden-

tifiable segment of the community" approach would require prospective application only.

However, even if this Court somehow considered as established the proposition that juries from which persons biased on the issue of capital punishment had been excluded are "prosecution prone," it would not follow that retrospective application of new standards would be required. "The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.', 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall v. Denno, supra* at 298. We submit that the probability that the practices here under attack have significantly affected the reliability of the guilt-determining process in the cases where they have been employed is exceedingly remote. Viewing petitioners' factual contentions in the light most favorable to petitioners' claims, they speak only in terms of "tendencies" on the part of the class of excluded jurors to be more sympathetic to defendants than were the juries as actually constituted. No claim is made that any juror in any capital case was in any way biased against the accused. Moreover, had persons biased against capital punishment not been excluded for cause on the basis of their views on the death penalty, they would in most cases have been excluded through the use of peremptory challenges, or perhaps for cause on some other ground, such as the inability to render a verdict of guilty in a capital case. Compared with the patent unfairness arising from, for example, a lack

of counsel, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), any conceivable unfairness in the practices challenged here would be extremely speculative. It is doubtful that such speculative unfairness could be as pronounced as that arising from a mistaken identification resulting from an improperly-conducted lineup. Since constitutional rules designed to promote fairness in lineup procedures were not given retrospective application, *Stovall v. Denno*, *supra*, neither should any new rules the Court might see fit to make which would impair the states' right to exclude jurors for bias on an issue in the case they are to decide.

"The extent of the reliance by law enforcement authorities on the old standards" is fully as pervasive in the area of jury-selection procedures as it was in the area of lineups. The courts of at least 35 states and the federal system have, it may safely be assumed, allowed challenges for cause of venirement opposed to the death penalty, under applicable local standards, in every case in which the prosecution sought the death penalty. The only two courts which have ever disallowed such challenges have rested their decisions upon the construction of local statutes. See *State v. Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State v. Garrington*, 11 S.D. 178, 76 N.W. 326 (1898). The federal courts of appeals have repeatedly and recently upheld the practices. See, *e.g.*, *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967); *Turberville v. United States*, 303 F.2d 411 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962); *United States ex rel. Dukes v. Sain*, 297 F.2d 799 (7th Cir. 1962), *cert. denied*, 369 U.S. 868, *United States v. Puff*, 211 F.2d 171 (2d Cir.), *cert. denied*, 347 U.S. 963

(1954). Although this Court has never written an opinion expressly affirming the constitutionality of the practice of excluding capital jurors for bias against the death penalty, the practice was sustained by this Court as a matter of federal law in *Logan v. United States*, 144 U.S. 263, (1892). And, of course, this Court has consistently declined to review decisions upholding the practice (and did so as recently as December 5, 1967, see *Miller v. California*, 36 U.S.L. Week 3221, 3226).

Amici LDF-NORI claim that "*Fay v. New York*, 332 U.S. 261 (1947), pretty plainly told those who cared to read that *if and when the practice could be proved to result in prosecution-prone or unfairly biased juries*, the Court would strike it down." Brief for *Amici* LDF-NORI, p. 87. This is, quite simply, a serious distortion of *Fay*. That case did imply that if it could be proved that the jury-selection procedures there under consideration resulted in juries which were "organized to convict," the practices would be struck down. But those practices involved highly selective jury-picking procedures which were justified solely by convenience in judicial administration and not by the necessity for obtaining competent jurors.

We submit that reliance upon the "old standards" (if the present practices are to be replaced) is clearly as extensive in the instant cases as it has been in any of the cases where this Court has declined to apply retrospectively a new constitutional doctrine.

The final criterion is "the effect on the administration of justice of a retroactive application of the new standards." The effect, quite simply, would be chaotic. The essence of petitioners' claim is that the exclusionary prac-

tices complained of denied them a fair trial on the issue of guilt. Should this claim be sustained, it could be urged by every person convicted of any offense, regardless of the sentence he actually received, by a jury from which had been excluded persons conscientiously opposed to the death penalty. The number of persons who fall into that category, and would thus presumably[3] be entitled to a new trial were the Court to give retrospective application to a ruling overturning the exclusionary practices, is enormous. Regrettably, we cannot present the Court with precise figures, or even reasonably accurate estimates. However, some rough estimates may help elucidate the problem.

The Bureau of Criminal Statistics, California Department of Justice, has helpfully provided us with some relevant statistics. In 1966, in California, 169 persons were convicted by juries of some offense after going to trial on a capital charge. There were 133 convicted after being charged with murder, 33 convicted after being charged with kidnaping, and 3 convicted after being charged with violating Cal. Pen. Code § 4500 (aggravated assault by a

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[3]The Court could diminish the number of new trials somewhat by applying a type of "harmless error" rule. If, in a given case, the total number of excuses for cause, because of opposition to capital punishment, plus the number of peremptory challenges actually exercised by the prosecutor, did not exceed the number of peremptory challenges available to the prosecutor, any "error" in allowing the challenges for cause could be held harmless as the particular defendant, on the theory that every person excused for cause on this ground would have been excused peremptorily by the prosecutor were the challenge for cause not available. We would strongly urge that should this Court overturn present practices, and give its ruling retrospective application, the Court consider the application of such a "harmless error" rule to cases tried before the date of this Court's opinion in the instant case.

life prisoner). Each of these offenses carried a possible death penalty.[4] In each case in which such an offense is charged, therefore, the District Attorney has the right to challenge for cause any prospective juror who states, under oath, that his conscientious objections to capital punishment would preclude him from imposing the death penalty. How often that right is exercised, we have no way of knowing. But if it were exercised in only half the cases, the figure for California in 1966 would be 85. We may assume that figure would hold reasonably constant for recent years. Let us assume further that every person convicted during the last 10 years by juries selected in the manner complained of could challenge his conviction. The figure of 10 years is arbitrarily selected but not unreasonable. It allows for the fact that a great many persons have been serving their sentence (in prison or on parole) for considerably more than 10 years, as well as for the fact that some persons convicted within the last ten years have died and others have fully served their sentences. Accepting the figure of 10 years, however, it can be estimated that 850 California prisoners would claim a right to a retrial. To get some idea of the figure for the entire nation, it is again appropriate to multiply this figure by 10. California has approximately 10% of the national population. Although some states have never

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[4]Kidnaping, a violation of Cal. Pen. Code § 209, is punishable by death only where the victim sustains bodily harm. However, a charge of bodily harm need not appear in the accusatory pleading in order for the pleading to charge a capital offense. *People v. Britton*, 6 Cal.2d 1, 56 P.2d 490 (1936). Accordingly, at any trial wherein the accused has been charged with violating Cal. Pen. Code § 209, the District Attorney may excuse for cause those veniremen who swear that they cannot return a death verdict.

had the death penalty, and others have recently abolished it, many states have a considerably wider range of capital crimes than California, notably including rape and armed robbery, and could thus be expected to have proportionately more persons serving various sentences who were tried by juries selected according to the complained-of practices.

The foregoing figures yield an estimate of 8500 prisoners or parolees throughout the nation who could claim the benefits of a restrospective application of the rule contended for by petitioners. The estimate is necessarily rough, and depending upon the accuracy of the assumptions upon which it is based, could easily be off by several thousand. We submit, however, that the group of persons whom a retrospective ruling could conceivably benefit is quite large. This fact demonstrates the severe impact on the administration of justice that would be occasioned by retrospective application of any new ruling.

The foregoing problem has been acknowledged by *amici* LDF-NORI, who suggest a "solution": application of a new ruling only to those who received a death sentence. With all due respect to the learned counsel for *amici,* we find this suggestion utterly preposterous. If, as petitioners claim, the jury-selection procedures attacked denied them a fair trial on the issue of guilt, there is no rational basis whatever for differentiation as to retrospective application between those who did and those who did not receive the death penalty. This Court has recognized as much by granting certiorari in *Bumper,* No. 1016, where the death penalty was not in fact imposed. It is unsound to assert that only those actually sentenced to death have

suffered "the full brunt of the practice." (Brief for *Amici* LDF-NORI, p. 91.) One who did not receive the death penalty should be in a stronger position than one who did to assert the claim, since as to him, the jury exclusion proved in retrospect not to be necessary. Assuming that the burden on each state and county of retrying only those sentenced to death would be tolerable (a dubious assumption indeed, in view of the fact that California has 75 men under sentence of death, 34 of them tried in Los Angeles County), this fact should not constitute a basis for differentiation. In both *Stovall v. Denno, supra,* and *Johnson v. New Jersey,* 384 U.S. 719 (1966), this Court declined to give persons under sentence of death the benefit of new constitutional rules which it had just articulated in cases involving both capital and non-capital defendants. In each such case it could be argued that the "full brunt" of the complained-of practice fell on those sentenced to death, precisely because they were sentenced to death. And it is no answer to claim that the practices here under attack are "uniquely related to death cases." Although they are uniquely related to cases involving capital charges, they affect equally all those convicted, regardless of the penalty actually imposed.

We can think of only one theoretical basis for the suggested distinction: that the instant litigation has as its sole but covert purpose the judicial abolition by indirection of the death penalty. This end is all but admitted by *amici* LDF-NORI to be their aim. See pp. 2-M-5-M of their brief. We have no doubt that a retrospective application of a constitutional rule forbidding the exclusion

from capital juries of those veniremen who cannot impose the death penalty would drastically reduce the number of persons executed, and conceivably could wipe out capital punishment altogether.[5] We can only repeat that judicial abolition by indirection is a goal which cannot be countenanced. If the death penalty is constitutional, the state and federal governments must be allowed the means to impose it.

For the foregoing reasons, we strongly urge this Court to give prospective application only to any new constitutional ruling which may be the product of the instant litigation. We suggest that this could be accomplished by affirming the judgment in *Witherspoon*, No. 1015, on the ground that the petitioner in that case is collaterally attacking his conviction. We do not mean, however, to imply that a ruling on retroactivity should be based on a distinction between direct and collateral attack. Rather, we contend that any new ruling should be applied only to cases where the trial commences after the date of this Court's opinion. This Court, however, has used cases on collateral attack as vehicles for giving prospective application only to rules announced in cases coming up on di-

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[5]We cannot say that abolition of capital punishment would necessarily be the result of a ruling by this Court which would prevent the exclusion of jurors who cannot return a death verdict. It is clear, however, that such a ruling would introduce an unconscionable element of caprice into the administration of the death penalty. A given defendant could not receive a death sentence if a given panel contained so many persons unable to concur in a death verdict that the prosecutor's peremptory challenges would be insufficient to prevent at least one of them from getting on the jury. Imposition of the death penalty would thus increasingly turn on such chance factors as geography and composition of the panel (which may or may not reflect community sentiment), rather than upon the merits of individual cases.

rect attack, see *Stovall v. Denno* and *Johnson v. New Jersey, supra,* and we suggest that it would be proper to make a similar distinction between *Bumper,* No. 1016, and *Witherspoon,* No. 1015.

CONCLUSION

This Court should uphold the practice of disqualifying from capital cases those prospective jurors who are opposed to the death penalty. In any event, this Court should go no further than to hold that such disqualifications are permissible only where the prospective jurors are wholly precluded by their views from imposing the death penalty. Should this Court reject our position on the merits, its ruling should be given prospective application only.

Dated, San Francisco, California,
April 12, 1968.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois.

Respondents.

(On Writ of Certiorari to the Supreme Court of Illinois)

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

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Andres v. United States, 333 U.S. 740 (1948) 33

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Labat v. Bennett, 365 F. 2d 698, 720 (5th Cir. 1966), *cert. den.*, 386 U.S. 991 (1967) 26
Logan v. United States, 144 U.S. 263 (1892) 12
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Annot., *Beliefs Regarding Capital Punishment As Disqualifying Juror in Capital Case for Cause*, 48 A.L.R. 2d 560 (1954) 16

Crosson, *An Investigation Into Certain Personality Variables Among Capital Trial Jurors*, January, 1966 (unpublished) 21, 22

Finkelstein, *The Application of Statistical Decision Theory to the Jury-Discrimination Cases*, 80 Harv. L. Rev. 338 (1966) 25

Goldberg, *Attitude Toward the Death Penalty and Performance as a Juror* (unpublished) 21, 22

Oberer, *Does Disqualification of Jurors For Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 Texas L. Rev. 545 (1961) 22

Wilson, *Belief in Capital Punishment and Jury Performance* (1964) (unpublished) 21, 22

Zeisel, *Some Insights into The Operations of Criminal Juries,* (1957) (unpublished) 22, 23

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Respondents.

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 36 Ill. 2d 471, 224 N.E. 2d 259 (1967).

JURISDICTION

This is adequately set forth in Petitioner's Brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are adequately set forth in Petitioner's Brief.

QUESTIONS PRESENTED

1) Whether the trial court abused his discretion in excusing jurors who indicated that they would not, regardless of the evidence, impose a punishment provided for by law?

2) Whether a few inconclusive and incomplete psychological studies are sufficient to show as a matter of "demonstrable reality" that the petitioner was deprived of a trial by impartial jurors, when the jurors indicated that they could be impartial and when there was no claim to the contrary until six years after the trial concluded?

3) Whether it was arbitrary to exclude all persons who indicated a deep-seated bias which would preclude them from being impartial jurors?

4) Whether a defendant is entitled to a jury which is absolutely representative of community thinking, when there has been no arbitrary exclusion of any identifiable group of qualified individuals?

SUPPLEMENTAL STATEMENT OF FACTS

While Petitioner Witherspoon's Statement of Facts is generally accurate and substantially complete, the Statement should be supplemented to the following extent:

The Murder

On April 29, 1959, William Witherspoon shot and mortally wounded a uniformed Chicago policeman while he was attempting to evade arrest. At the time of the shooting, there were three outstanding warrants for Witherspoon's arrest; two of these warrants charged Witherspoon with armed robbery, and one charged him with unlawful flight to avoid prosecution. (A. 72, 77, 83)* Shortly after the shooting, Witherspoon was apprehended and taken to the police station. While in custody, he informed the police that the tattoo on his right hand knuckles, which read "H-A-T-E", meant that he hated police. (A. 100). He also explained the shooting: "I was hot and I didn't want to be taken in. I was wanted for robberies in Detroit, I had been in the penitentiary before and I didn't want to go back, that's why I shot." (A. 54)

The Trial

At the trial on a charge of murder, Witherspoon was represented by three court-appointed attorneys, one of whom was then head of the Chicago Bar Association Defense of Indigents' Committee.

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*The People have adopted the form of citations used by the Petitioner. Thus "A" refers to the printed Abstract filed in the Supreme Court of Illinois on petitioner's original appeal. (No. 36277) "R" refers to the transcript of petitioner's trial, not printed. "Abst." refers to the printed Abstract filed in the Supreme Court of Illinois on this appeal (No. 39387) "App." refers to the various appendices to this Brief.

Immediately after the various attorneys were introduced, the trial judge explained the purpose of the *voir dire* examination:

> "Now, what we are trying to do here in these cases is to get twelve men and women who can take the box and fairly and impartially try this case for both sides. In other words, you don't have any leaning for the State or you don't have any leaning for the defendant. Your mind is completely neutral. You decide the case from the evidence you hear from the witness stand and you're bound by the law that the court gives to you, in written instructions, which will be given to you at the close of the case." (Rec. 634)

When the first prospective juror (Clifford Salazar) was asked whether he had "conscientious or religious scruples against imposition of the death penalty in a proper case", he was unable to understand the question, so the Assistant State's Attorney and the judge explained exactly what was meant when that question was asked:

> "Q. . . . What the Judge and I are asking is this: If you're one of the twelve jurors, our testimony will be developed on the witness stand, and then, when all the witnesses are through testifying, his Honor, Judge Salter, will give you the rules of law that apply to a charge such as this, and then you and the other eleven would retire to the jury room. And if it should be your opinion, along with the other eleven jurors, all twelve of you agree that the defendant Witherspoon is guilty of murder and that death in the chair is a proper verdict, would you say so by signing a guilty verdict?
>
> "A. No, sir.
>
> "The Court: In other words, you don't believe that you would vote to inflict the death penalty in any case?
>
> "A. No.

"Q. In other words, what counsel is getting at is this: If you have a conscientious or religious scruple against the infliction of the death penalty, say so to the gentleman.

"A. Yes, sir." (*Petitioner Witherspoon's Brief*, App. 2)

It was only then that Mr. Salazar was excused. As is common in most states, the other members of the venire were then present in the courtroom and were able to hear that explanation, and they had previously been instructed to listen to the examination. (R. 636) Subsequently, the prospective jurors were generally excused when they answered affirmatively to the question—"Do you have a conscientious or religious scruple against infliction of the death penalty in a proper case?"—but periodically the judge, in the hearing of the other prospective jurors, made sure that the scrupled juror would not, regardless of the evidence, return any death verdict.

Thus the 11th juror examined (Casimir Mlyniec) was questioned as follows:

"Prospective Juror Mlyniec: I couldn't go all the way, though, because I couldn't see to put a man to death.

"Mr. Cronin: Cause, your Honor.

"Mr. Cernek: Let the State inquire.

"The Court: Q. In other words, you have a conscientious scruple against the infliction of the death penalty in a proper case?

"Juror Mlyniec: Yes, sir.

"The Court: Q. Regardless of the evidence. In no case would the evidence be strong enough to satisfy you that the death penalty should be inflicted?

"A. Yes, sir.

"The Court: All right, challenge for cause. Step aside." (*Petitioner Witherspoon's Brief*, App. 8)

And again the 15th juror examined (Julia Darcy) was questioned even after she said she had religious scruples and even after the State had moved to excuse her.

"Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

"A. I have a religious scruple.

"Mr. Kissane: Cause, Judge.

"The Court Q. In other words, did I understand you to say that you wouldn't vote for the death penalty in any case regardless of the evidence?

"A. Yes, sir.

"Q. We haven't heard the evidence here yet. We don't know what it will be but it will be developed from the witness stand. But I understand that your position is that you have a religious scruple against the infliction of the death penalty in any case?

"A. Yes, sir.

"The Court Challenge for cause is granted. Step aside." (*Petitioner Witherspoon's Brief,* App. 10, 11)

The 58th juror examined (Prospective Juror No. 226) was excused when he said he didn't believe in the death penalty even though it was the law of the state. (*Petitioner Witherspoon's Brief,* App. 29)

Later, the 78th juror examined (Helen Jedinak) initially said that she had religious and conscientious scruples against infliction of the death penalty in a proper case, yet the judge persisted in the questioning and tendered her to the attorneys when it appeared that she had no such scruples, but merely did not want the responsibility of imposing the death penalty. It was not until she expressly stated she could not be fair and impartial that the judge excused her for cause. (*People's Brief,* App. C)

The 81st juror examined (Prospective Juror No. 86) was excused when he flatly said he would not vote for the the death penalty no matter what the evidence was.

"The Court: To save time, I want to ask you this question:—It's really the lawyer's duty but, then, I'm pinch hitting for both sides here—Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

"Prospective Juror 86: Yes, I do.

"The Court: It doesn't make any difference what the evidence is, you'd never vote for the death penalty?

Prospective Juror 86: No." (*Petitioner Witherspoon's Brief*, App. 37, 38)

The 88th juror examined (Prospective Juror No. 70) was excused after the following questioning:

"The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

"Prospective Juror 70: Yes, I have, your Honor.

"The Court: How do you entertain such scruples?

"Prospective Juror 70: Well, I have been a Catholic all my life and I don't believe in the death penalty, that's all.

"The Court: It isn't against your religion, is it?

"Prospective Juror 70: No, it isn't.

"The Court: Then it's a personal opinion?

"Prospective Juror 70: Yes, sir.

• • •

"The Court: You disbelieve it, regardless of what the evidence is? We don't know what the evidence is in this case, but it's a murder charge and we don't know, from the evidence, whether the death penalty warrants it. The State is qualifying, as you heard,

for the death penalty. But your position is that you wouldn't vote for the death penalty in any case?

"Prospective Juror 70: No, sir." (*Petitioner Witherspoon's Brief*, App. 40, 41)

Aside from the questioning of prospective jurors in regard to conscientious or religious scruples, the trial court, at several points during the *voir dire* examination, reemphasized that the purpose of the examination was to get a fair trial for both sides. For example, on questioning it developed that one prospective juror (Paul Ongena) had a brother whose son-in-law was a policeman, and when he admitted that he was uncertain whether this would effect him, he was excused for cause upon the defendant's motion. (*People's Brief*, App. C)

And again later on, the judge excused a policeman's wife (Agnes Giles, 86th juror examined) despite the fact that she said she had no "leanings" one way or the other.

"Q. What we try to do here is to get 12 men and women to start out where there is no possibility to have any leaning one way or another.

"A. That's right.

"The Court: It appears to the court that it is probably not conscious to you. You might have some leaning. I'll grant the challenge for cause. You may stand aside.' '(Rec. 969)

At no point did any of the three defense counsel attempt to bring out that any of the jurors excused might have been able to return a guilty verdict despite their conscientious and religious scruples. At no point did the defendant's attorneys object to these jurors being excused for having scruples. When the jury had finally been picked, the defendant still had three peremptory challenges left. (*People's Brief*, App. A, "Totals")

Post-Conviction Proceedings

These are adequately detailed in Petitioner Witherspoon's Statement of Facts. However, it should be noted that Witherspoon, though indigent, has been represented by some of the most experienced and competent counsel in Illinois throughout all of the proceedings.

SUMMARY OF ARGUMENT

The Constitution requires that jurors be "impartial", and since the birth of our Nation this phrase has been construed to disqualify anyone who indicates a bias or prejudice which prevents him from rendering a true verdict on the law and the evidence. The jurors who were excused for having conscientious or religious scruples indicated that they would not under any circumstances prescribe a penalty provided for by law, and the trial court did not act arbitrarily or abuse his discretion in excusing such individuals. The persons excused had nothing in common except a bias in the defendant's favor, and petitioner failed to show as a matter of demonstrable reality that he was deprived of a trial by twelve impartial jurors. Furthermore, petitioner's right to a "cross-section" of the community does not give him the right to have on his jury persons who are biased in his favor.

PREFATORY STATEMENT

At the outset the People would like to comment briefly regarding certain subjects argued by the various *amicus curiae* briefs, lest the People's failure to either argue or comment on these points be deemed an inability to meet the arguments presented. The subjects referred to are two: First, it is earnestly argued that the death penalty is unwise. Secondly, it is argued that a decision herein should be deferred until after evidentiary hearings and until the issue presented herein can be considered in conjunction with other allegedly related issues.

In regard to the first subject, the People have made no attempt to meet the arguments raised thereon. The contentions for and against capital punishment are many, varied and often emotional. The arguments on both sides have been made every time the Illinois Legislature has convened since the year 1957, and the People feel that such is the proper forum for them. Aside from this comment, the People would only note that there are two cases pending in the Illinois courts which provide strong support for those who would retain the death penalty. In one case the accused was convicted of methodically slaughtering eight nurses, six of whom were bound and helpless. (*People* v. *Speck,* 67-4-20-27, Circuit Court, Peoria County). In the other case, a convict—who was already serving a 25-year sentence for murder—was convicted of killing three prison guards. (*People v. Bassett, et al.,* 554-66, 555-66, 556-66, Circuit Court, Sangamon County)

In regard to the second subject, petitioner Witherspoon has already sought review on two occasions of many of these so-called intertwined constitutional issues. On the first occasion, *certiorari* was denied completely [337

F. 2d 427 (7th Cir. 1964), *cert. den.*, 379 U.S. 950 (1964)], and on this last occasion, *certiorari* was granted for consideration of a relatively narrow issue which is now ripe for determination. In the petition for post-conviction relief (which gave rise to this review) there was a general request for a hearing, but petitioner's counsel expressly stated in the trial court that no evidentiary hearing was necessary or requested as to the issue on which certiorari was later granted. (R. Vol. IV, p. 0210) The petitioner has mainly directed himself to arguing this one issue, and the People have done likewise in the following pages. As to the other "related issues", the People have confidence that the lower federal courts will be able to adequately interpret the federal Constitution. Substantial and current federal questions have always been accepted and considered by this Court as the cases arose and as the issues were ripe for determination, but after the lower courts had considered the problems and had an opportunity to resolve them. The People suggest that this traditional procedure is much more fitting than the approach now suggested, that of deferring action until a sweeping review of state capital trial criminal procedure can be undertaken. One problem has been accepted and fully argued. That issue is capable of resolution now, and the People submit that it should be resolved in its favor.

In light of these considerations, the People of the State of Illinois have not attempted to meet many contentions made in the briefs filed by the *amicus curiae*.

ARGUMENT

I.

THE ILLINOIS STATUTE WAS APPLIED ONLY TO EXCLUDE THOSE PROSPECTIVE JURORS WHO COULD NOT BE "IMPARTIAL" AS REQUIRED BY THE FEDERAL CONSTITUTION, AND THE PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY ON THE QUESTION OF GUILT OR INNOCENCE BY THE PRACTICES EMPLOYED BY THE TRIAL COURT.

A.

The Constitution requires that jurors be impartial as to both the defendant and the government.

The Constitution guarantees every accused the right to trial by an impartial jury, but such impartiality requires not only freedom from bias against the accused, but also from any prejudice against the prosecution. [*Hayes* v. *Missouri,* 120 U.S. 68, 70 (1887). See *Swain* v. *Alabama,* 380 U.S. 202, 220 (1965)] And any juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, is not an impartial juror. [*Logan* v. *United States,* 144 U.S. 263, 298 (1892)]. It is not enough that the juror be impartial as to guilt; he must also be able to exercise his discretion as to punishment, freely and without any preconceived impediments. [*Piccott* v. *State,* 116 So. 2d 626, 628 (Sup. Ct. of Fla. 1959), *cert. den.,* 364 U.S. 293, 81 S. Ct. 106 (1960)]. "To insist on a

juror's sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudice, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to produce the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice [which is required]." [*United States* v. *Cornell*, 25 F. Cas. 650, 655, 656 (1820) (Case No. 14, 868)]

B.

The trial court excused only those jurors who indicated that they could not be impartial, and in doing so it was acting reasonably and within the discretion traditionally allowed a trial court.

When the first juror was asked if he had any conscientious or religious scruples against imposition of the death penalty, he was unable to understand what this meant, so the Assistant State's Attorney and the judge explained exactly what was meant by that question:

> "What the Judge and I are asking is this: If you're one of the twelve jurors, our testimony will be developed on the witness stand, and then, when all the witnesses are through testifying, his Honor, Judge Salter, will give you the rules of law that apply to a charge such as this, and then you and the other eleven would retire to the jury room. And if it should be your opinion, along with the other eleven jurors, all twelve of you agree that the defendant Witherspoon is guilty of murder and that death in the chair is the

proper verdict, would you say so by signing a guilty verdict?

A. No, sir."

"The Court: In other words, you don't believe that you would vote to inflict the death penalty in any case?

"A. No.

"Q. In other words, what counsel is getting at is this: If you have a conscientious or religious scruple against the infliction of the death penalty, say so . . .

"A. Yes, sir." (*Petitioner Witherspoon's Brief,* App. 2)

This explanation conforms to Illinois decisional law. [*Gates* v. *People,* 14 Ill. 433, 435 (1953); *People* v. *Hobbs,* 35 Ill. 2d 263, 270 (1966), *cert. den.,* 386 U.S. 1024 (1967)] and it is consistentent with the general thought that a "conscientious scruple" signifies not merely a general dislike for capital punishment, but rather an inability to render a fair and impartial verdict on the law and evidence [*E.g., Turberville* v. *United States,* 303 F. 2d 411, 419, 420 (D.C. Cir. 1962), *cert. den.,* 370 U.S. 946, 82 S. Ct. 1596, 8 L. ed. 2d 813 (1962)].

It is clear that the juror was excused only after he admitted that he would not return a verdict allowed by law. Since the other prospective jurors on that venire were present in the courtroom when the explanation was made, and since they had previously been instructed to listen to the examination (R. 636), it was obviously not necessary to repeat the meaning of the question each time. If there had been more extensive questioning, there might well have been a claim later that the death penalty was unduly emphasized. [Cf. *People* v. *Crump,* 5 Ill. 2d 251, 264 (1955)] Periodically the judge made sure that the pros-

pective juror, who stated he had scruples, was unalterably opposed to imposing a death penalty under any circumstances, and no more than that was practical or required. An affirmative answer to the question asked—"Do you have any conscientious or religious scruples against imposition of the death penalty in a proper case?"—clearly indicated that the juror would not under any circumstances return a verdict calling for the death penalty, and any further probing—in the absence of any objection or questions by the defense attorneys—was unnecessary and would merely have embarrassed the juror. [*United States* v. *Puff*, 211 F. 2d 171, 186 (2d Cir. 1954), *cert. den.*, 347 U.S. 963 (1954)]. As Judge Learned Hand once noted:

> "If trial by jury is not to break down by its own weight, it is not feasible to probe more than the upper levels of a juror's mind." [*United States* v. *Dennis*, 183 F. 2d 201, 227 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951)].

The upper levels of the prospective juror's mind were probed by use of the question asked, and by answering "yes" to that inquiry as it was explained initially, the prospective juror indicated an inability to render the fair and impartial verdict which the trial court consistently emphasized that they were seeking. As early as 1813 this Court recognized the importance of excluding jurors who indicated some bias:

> "[Jurors] ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way." [*Mima Queen & Child* v. *Hepburn*, 11 U.S. (7 Cranch) 290, 297 (1813)]

Furthermore, the trial court traditionally has been entrusted with determining whether a juror's views were strong enough to show partiality, and its findings are not generally set aside unless error is manifest. [See *Spies* v. *Illinois,* 123 U.S. 131, 179 (1887)]. Here there was no manifest error, since the trial court was acting in accordance with long-standing and well-settled law when it excused those individuals whose scruples prevented them from imposing the death penalty. [See Annot., 48 A.L.R. 2d 560 (1954), listing the jurisdictions where this question has previously arisen and showing that the courts of 36 out of 38 jurisdictions have held that jurors with conscientious or religious scruples against capital punishment should be excused for cause. Also *Cf. Miles* v. *United States,* 103 U.S. 304, 310 (1880)].

It is argued in opposition to the People that there was an abuse of discretion, because the jurors excused might nonetheless have been able to return a guilty verdict, because the jurors excused were still able to exercise their discretion as to punishment, and because the State's right to impartial jurors on the question of punishment cannot supersede the defendant's right to an impartial jury on the question of guilt or innocence. These contentions will be met in that order.

In regard to the first contention, it is generally recognized in Illinois and in other jurisdictions that a "conscientious or religious scruple" against the death penalty consists of more than a mere theoretical or general dislike for capital punishment. [*Turberville* v. *United States,* 303 F. 2d 411, 419, 420 (D.C. Cir. 1962), *cert. den.,* 370 U.S. 946, 82 S. Ct. 1596, 8 L. ed. 2d 813 (1962). Also see *Gates* v. *People,* 14 Ill. 433, 434 (1853)] At no point did any of

defendant's three trial counsel make any attempt to amplify the juror's views, and as the Record stands, each juror who answered the question affirmatively, to signify such scruples, was excused only for indicating an inability to render a fair and impartial verdict generally. [*Turberville* v. *United States,* 303 F. 2d 411, 420 (D.C. Cir. 1962), *cert. den.,* 370 U.S. 946, 82 S. Ct. 1596, 8 L. ed. 2d 813 (1962)]. This was apparently so reasonable and obvious that defense counsel made no objection to the prospective jurors being excused. While theoretically such jurors might have nonetheless been able to determine guilt or innocence, their feelings were such so as to interfere with their duty to act impartially, as required by the Federal Constitution, and if such jurors were allowed to sit, their partiality toward the penalty to be imposed would in most cases preclude any verdict and would grant the defendant practical immunity. [*People* v. *Hobbs,* 35 Ill. 2d 263, 271, 272, 220 N.E. 2d 469 (1966), *cert. den.,* 386 U.S. 1024, 87 S. Ct. 1381, 18 L. ed. 463 (1967)] It is no answer to say that a two-stage trial would have been a better procedure, since, as Justice Cardozo once remarked, a state's criminal procedure does not run afoul of the Fourteenth Amendment because another method may seem fairer or wiser. [*Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934)]. Separate verdicts dealing with guilt or punishment are foreign to Illinois Practice [*People* v. *Bernette,* 30 Ill. 2d 359 (1964)], and two part jury trials have never been compelled by this Court as a matter of constitutional law. [*Spencer* v. *Texas,* 385 U.S. 554, 568, 87 S. Ct. 648, 656 (1967)].

In regard to the second contention, the argument is made that a juror can follow the law even though he has scruples against imposition of the death penalty, because

the law merely provides that he should exercise his discretion as to the penalty. No matter how this argument is phrased, the simple fact is that it requires that the Constitution be interpreted as giving an accused the right to trial by a "slightly biased" jury rather than an "impartial" jury. This argument is of course contrary to a legion of cases holding that a juror must be indifferent between the parties [See, *e.g.*, *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887)], and, furthermore, it is also contrary to good reason. If this argument is sustained, then the State similarly has a right to a jury composed of individuals who believe that the death penalty should be imposed in the case being tried. This is not merely a theoretical or hypothetical situation, since at least one prospective juror in a recent Illinois prosecution—where the defendant was charged with methodically slaughtering eight nurses—stated on *voir dire* that he would not consider anything other than the death penalty if the defendant's guilt were proven. The law however is to the contrary, and the courts have always held that such individuals should be excused for cause. [*Stroud* v. *United States*, 251 U.S. 15, 20, 21 (1919); *United States* v. *Puff*, 211 F. 2d 171, 182 (2d Cir. 1954)]. In any civil rights prosecution in the South, the defendant would have a right to jurors who believed that no white man should get more than a twenty-year sentence for killing a Negro. A defendant in a dry State, who is being prosecuted for violation of liquor laws, would be entitled to jurors who believed that a person should be fined but not imprisoned for such violations. Such consequences, and many more, would naturally follow if the argument of *amicus curiae* is accepted, and the People do not believe that such a unique interpretation of our Constitution is warranted.

In regard to the third contention, it is argued that the exclusion of death-scrupled jurors deprives the defendant of a fair trial on guilt or innocence, and that defendant's right to impartiality on guilt or innocence must be paramount to the State's right to an impartial trial on the issue of punishment. This argument will now be considered.

C.

Petitioner has failed to demonstrate that the exclusion of scrupled jurors deprived him of a fair trial on the question of guilt or innocence.

Before examining the so-called proof that petitioner was deprived of a fair and impartial trial on the question of guilt, let us examine the circumstances under which this claim is made When the scrupled jurors were questioned, no attempt was made by defense counsel to show that they were nonetheless competent jurors. When the scrupled jurors were excused, no claim was made that such exclusion deprived Witherspoon of a fair trial on the question of guilt or innocence. When the jurors finally were accepted by defense counsel, the defense still had three peremptory challenges left to exercise. (This latter fact in and of itself has often been taken as a convincing indication that the jurors who were impanelled were impartial. See cases collected in *United States* v. *Puff*, 211 F. 2d 171, 185 (2d Cir. 1954)). The jurors finally accepted by defense counsel said that they could be fair and impartial, and such an assurance should not lightly be discarded. [*Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Dissenting opinion)]. This exact claim, that exclusion of scrupled jurors deprived defendant of a fair trial, was not specifically raised until six years after the trial had concluded. Even then,

petitioner's counsel considered the claim a "legal issue", and he stated that no hearing was required. (R. Vol. IV, p. 0210) In most cases involving claims of due process deprivations, this Court has required a showing of identifiable prejudice to the accused, and it is only where a procedure employed by a State involves such a probability that prejudice would result that no showing of harm is required. [*Estes* v. *Texas,* 381 U.S. 532, 542 (1965)]. The circumstances of this case indicate that there was no such great probability of prejudice, and the People submit that the accused must make a clear showing of prejudice.* Let us now examine the contentions relied upon to establish that petitioner was deprived of a fair trial.

The petitioner, and those *amicus curiae* supporting his position, rely on two arguments to sustain the proposition that he was deprived of a fair trial. First, it is argued as a matter of logic that non-scrupled jurors must necessarily be partial to the prosecution. Secondly, it is argued that various studies show that non-scrupled jurors are "prosecution prone" and therefore unable to give a defendant a fair trial. In regard to the first argument, the fallacy of petitioner's logic is most eloquently exposed in the case of *Turberville* v. *United States:*

> ". . . No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are

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* The People are fully aware of cases such as *Ballard* v. *United States,* 329 U.S. 187 (1946), and similar cases holding that no showing of prejudice need be shown in an individual case where there has been a systematic and arbitrary exclusion of an eligible class from jury duty. However, the People will point out in the next argument that there was no such arbitrary exclusion of an eligible class.

so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case. Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment. The two antipathies can readily coexist; contrariwise either can exist without the other; and indeed, neither may exist in a person. It seems clear enough to us that a person or a group of persons may not be opposed to capital punishment and at the same time may have no particular bias against any one criminal or, indeed, against criminals as a class; people, it seems to us, may be completely without a controlling conviction one way or the other on either subject.. . . ." [303 F. 2d 411, 420, 421 (D.C. Cir. 1962), *cert. den.*, 370 U.S. 946 (1962).]

Let us now examine the four studies relied upon to establish that the defendant was deprived of a fair trial on the question of guilt or innocence. The first two studies, one by Cody Wilson and the other by Faye Goldberg, were based on questionnaires distributed to college students. Both of these studies were based on rather small samplings (187 students in the first study, and 200 students in the second) and apparently none of these students had ever served as jurors. The validity of such studies, based on college students, is perhaps most aptly described in another of the studies relied upon: "Actual juries are markedly heterogenous. Generalizing from college students to jury members is hazardous." (*An Investigation into Certain Personality Variables Among Capital Trial Jurors* by Robert Crosson, p. 25) Two of the five conclusions reached by Dr. Wilson, as to differences between scrupled jurors and non-scrupled jurors, did not reach

significance. (Brief of NAACP Legal Defense and Educational Fund, pp. 57, 58) Apparently neither of these studies gave any consideration to the ethnic backgrounds of the students, and the study of Dr. Hans Zeisel (also relied upon to support petitioner's argument) found that persons of various ethnic backgrounds differed vastly as to degrees of "proneness". And of course neither of these two studies were related to objectivity or impartiality in any way. Any study which compares one group of individuals having any common bias which would favor a defendant, with another group which stands indifferent on the same subject, will undoubtedly find that the latter group would be considered, relatively, more favorable to the prosecution. The Wilson and Goldberg studies merely show that scrupled jurors might perhaps convict less often than impartial jurors, but no defendant has the right to escape existing procedures on the ground that some other way will give him a beter chance of acquittal. [*Fay* v. *New York*, 332 U.S. 261, 285 (1947)]

The third study was a doctoral thesis by Robert Crosson, and it is set forth in part in Appendix D to this Brief. When one considers the attitude with which this study was undertaken, the results are most significant. Mr. Crosson begins his dissertation by commenting that the death penalty is barbaric, and then he discusses an article by Walter Oberer (39 Tex. L. Rev. 545 (1961)) stating an opinion that a defendant is deprived of a fair trial on guilt or innocence by the disqualification of scrupled jurors. Crosson then in effect sets out to support Oberer's argument by attempting to prove that death-qualified jurors are more dogmatic, more opinionated, more conservative, more manifestly hostile, and less critical in thinking than scrupled jurors. In spite of his attitude and approach, Crosson was able to prove only that death-qualified jurors

are more conservative than scrupled jurors, and in fact his studies indicated that scrupled jurors were slightly more opinionated than non-scrupled jurors.

The fourth study relied upon is a yet unfinished work by Hans Zeisel, entitled "Some Insights Into the Operation of Criminal Juries." It finds that scrupled jurors are "somewhat defense-prone" and that non-scrupled jurors are "somewhat prosecution-prone", in about the same degrees.

It should be noted that none of these four studies was offered into evidence, and defense counsel expressly stated to the trial court, at the post-conviction hearing, that the question presented herein was a legal issue and that no evidence was necessary. (R. Vol. IV, p. 0210) None of these studies takes into consideration that a jury verdict is a group verdict, and the People submit that these studies fail to show as a matter of "demonstrable reality" that the defendant was deprived of his right to a fair trial on the question of guilt or innocence. [*Darcy* v. *Handy,* 351 U.S. 454, 462 (1956)] Furthermore, such studies cannot and should not replace the traditional ways of determining whether a juror can be impartial in any given case.

The traditional way of making such a determination has been by *voir dire* examination, where the defense and the prosecution are able to face each juror and reach a judgment as to his or her ability to render an impartial judgment. Both the defense and the prosecution are allowed challenges for cause, and in addition either may summarily excuse a juror, on mere suspicion that he would be biased in some way. Of couse these procedures have always been subject to review by the higher courts, which will reverse where the Record clearly shows that the trial court abused

his discretion in either excusing a juror or refusing to excuse a juror. Such has all transpired in this case, and until six years after the trial concluded there was no hint that defendant was tried by an unfair jury. Now eight years after the trial has concluded, and in spite of a record devoid of any evidence that the jurors were partial in any way, the petitioner would rely on four sociological and psychological studies to prove that he was deprived of his constitutional rights. If such studies are accepted to determine what constitutes an impartial juror, rather ludicrous situations might arise in the future. For example, if a white, affluent, suburban dweller takes the stand and states that he can be a fair and impartial juror, is he to be disqualified nonetheless because the statistics show that such individuals are "prosecution-prone"? If such studies are accepted, the defense would be entitled to challenge for cause any juror who is British, no matter what he states about his ability to be impartial, because such individuals were found by the Zeisel study to be the most "prosecution-prone." The prosecution, on the other hand, should be able to automatically exclude any Italian, since members of that nationality are the most "defense prone." Such results would be contrary to our sense of orderly justice and right reason. The determination of whether or not jurors are "impartial" is peculiarly within the province of the courts, not the scientist, and these matters should be left to the bodies to which they have been traditionally entrusted. It is perhaps worthwhile to note in this connection that the use of scientific principles in legal controversies sometimes compels a different result than if constitutional principles are utilized. An illustration of this is that a mathematician, who examined two decided cases—one where this Court held that there was no intentional exclusion of Negroes from jury duty. [*Swain* v. *Alabama*, 380

U.S. 202 (1965)], and another where this Court denied certiorari after a State court had similarly held there was no intentional exclusion—has concluded that if the empirical science of mathematics had been applied to those cases, the conclusion would have followed that discrimination had in fact been practiced [Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," 80 Harv. L. Rev. 338 (1966)] In summary, though, it is the Court, not the scientist, which has been entrusted with the responsibility of making determinations as to whether or not a trial has in fact been fair, and under all the standards enunciated by this Court, the defendant has been given a fair trial by twelve impartial jurors.

II.

THE OPERATION OF THE ILLINOIS STATUTE DID NOT UNCONSTITUTIONALLY DEPRIVE PETITIONER OF A "REPRESENTATIVE" JURY, SINCE THERE WAS NO ARBITRARY EXCLUSION OF AN IDENTIFIABLE GROUP, AND SINCE THE FEDERAL CONSTITUTION DOES NOT REQUIRE THAT INDIVIDUALS WHO ARE BIASED IN FAVOR OF A DEFENDANT'S POSITION BE INCLUDED ON A JURY.

While this Court has said a jury must be taken from a cross section of the community, it has generally expressed that thought as *rationale* for the principle that it is unconstitutional for a state to systematically and arbitrarily exclude an identifiable group of persons who are otherwise qualified to be jurors. [See *Swain v. Alabama,* 380 U.S. 202, 228-230 (1965), where the dissenting opinion reviews most of the cases and points out the rationale for the de-

cisions] Thus in *Ballard* v. *United States* [329 U.S. 187 (1946)] there was a deliberate and systematic exclusion of all women; in *Hernandez* v. *Texas,* [347 U.S. 475 (1954)] a deliberate and systematic exclusion of all Mexicans; in *Thiel* v. *So. Pacific Co.* [328 U.S. 217 (1946)] a deliberate and systematic exclusion of daily wage earners; and in *Smith* v. *Texas* [311 U.S. 128 (1940)], *Strauder* v. *West Virginia,* [100 U.S. 303 (1879)] and many other similar cases, a deliberate and systematic exclusion of Negroes from the venires. However, it is not every exclusion that violates the Federal Constitution, but only those exclusions which are arbitrary or based on an unreasonable classification of an identifiable group. [See *Hoyt* v. *Florida,* 368 U.S. 57, 59, 60 (1961)]. Thus a State may prescribe juror qualifications, such as minimum educational requirements [*Strauder* v. *West Virginia,* 100 U.S. 303 (1879); *Gibson* v. *Mississippi,* 162 U.S. 565 (1896)], and it may exempt certain classes such as lawyers and doctors for the good of the community. [*Rawlins* v. *Georgia,* 201 U.S. 638 (1906); *Labat* v. *Bennett,* 365 F. 2d 698, 720 (5th Cir. 1966), *cert. den.,* 386 U.S. 991 (1967)]. The federal law itself provides that convicted and unpardoned felons, minors under 21 years of age, and those who have not resided within the judicial district for one year, are not qualified to serve as federal jurors. [28 U.S.C. § 1861]. Members of the armed forces, policemen and firemen, and public officers are expressly exempt from jury service. [28 U.S.C. § 1862]. Furthermore, a group of persons may be excluded for the public interest upon a finding of the district judge that there would otherwise be an obstruction or delay in the fair and impartial administration of justice. Each of the states has also provided similar qualifications and exemptions. The point of this is that a mere intentional exclusion of certain individuals does not in and of

itself violate the Federal Constitution; it is only when there is no reasonable explanation for such an exclusion, and only when the unreasonable action is directed at an identifiable group, that the Constitution is offended. The People submit that in the case at bar there was neither an arbitrary exclusion, nor was there an identifiable group excluded. We will first consider whether there was an arbitrary exclusion.

As was noted earlier, each of the jurors excused, by his admission of "scruples", had indicated a belief so strong as to preclude him from standing impartially as to both the government and the defense. If exclusion of such individuals violates the Constitution, then many other widespread and common criminal trial practices must fall in the future before similar challenges. For example, it would then also be arbitrary to excuse those who would consider nothing less than the death penalty. As to civil rights prosecutions in Southern states, it would be arbitrary to exclude those jurors believing in only minimum punishment for the offense charged. In short, in any case where the prospective jurors might be hesitant to impose an allowable penalty (such as in abortion prosecutions, liquor law prosecutions, gambling prosecutions, and income tax evasion prosecutions), it would be unconstitutional (according to petitioner's theory) to exclude even those individuals who stated on *voir dire* examination that they would impose no imprisonment or would not consider any sentence greater than the minimum prescribed by law. Such a holding is not warranted by either the Record or the law. Even in the new Jury Selection Act (Public Law 90—90th Congress, S. 989, reported in 2 Crl. 3161) which makes an attempt to broaden the group eligible for jury service in the federal courts, it is expressly pro-

vided that persons who may be unable to render impartial jury service may be excluded. The fact that defense counsel never made any objection to such exclusion, and the fact that this specific claim was not raised until six years after petitioner's conviction, is in and of itself, the People feel, a recognition that no arbitrary or unreasonable action was involved. During all this period of time, the petitioner has been represented by capable and experienced counsel, and certainly if any action by the trial court hinted of unreasonableness, the matter would have been presented to one of the numerous courts which have considered petitioner's claims. In summary, there is no arbitrary exclusion shown in this case.

Nor was there an exclusion of an identifiable group, since the only thing that the excused jurors had in common was a common prejudice which would have benefitted the defendant had they been allowed to serve. It is argued in effect that scrupled jurors are an identifiable group, because statistics show that females, Democrats and persons from the lower income groups will be excluded, while white, male, wealthy suburban dwellers would remain. This case demonstrates the fallacy of attempting to make constitutional arguments from general statistics; since the Record demonstrates that what is foretold did not in fact occur. While we cannot determine the race and politics of the various jurors, we can note that out of 29 identified jurors who were excused for scruples, more than half were men. (People's Appendix A); the statistics would indicate that the opposite would be true. We can also examine the final composition of the jury to determine if it was made up of ultra-conservative, affluent suburban dwellers that supposedly remain (according to the statistics and the Petitioner's arguments) after the scrupled jur-

ors are excused. The jurors chosen and a brief summary of their backgrounds is as follows:

1) Mrs. Blanche Carlson:

She lives in Chicago with her husband, and she works as a machine operator at Glaser Crandell Co. (R. 706)

She has three brothers who are employed as a truck driver, a stockclerk and a riveter. (R. 707)

Her father is dead, but he worked for the city, prior to his death, cleaning alleys. (R. 707, 708)

2) Mrs. Cecelia Lohmeier:

She has lived in Chicago for 14 years (R. 724), and prior to that she lived in Oshkosh, Wisconsin. (R. 726) She lives with her husband, who has been a Chicago Transit Authority driver for 15 years, and she works part time for a pastry shop. (R. 725)

3) Miss Victoria Blaha:

She has lived in Chicago all her life. (R. 747) She has worked for the past 34 years in the claims department of Travelers Insurance Company. (R. 748)

4) William Beuke:

He is a professional photographer for People's Gas, Light and Coke Company for the past 24 years (R. 753), and he lives at a Chicago address. (R. 753, 754)

5) Ernest Sparrow:

He lives at a Chicago address, and he has been an advertising promotion assistant for Libby, McNeil & Libby for a number of years. (R. 773)

6) Mrs. Alma Ruff:

She has lived in Chicago all her life. (R. 809) She has worked at the International Chemical Company in the printing office on a machine for 41 years. (R. 809, 810) Her husband was an electrician. (R. 811)

7) Fred Racine:

He has lived at a Cicero, Illinois, address for the past 14 years, and he has worked for Western Electric for almost 25 years as a tool and die maker. (R. 890)

8) Albert Klein:

He went to school in Chicago, but has resided in Elmwood Park, Illinois, for the past 6 years. (R. 905, 906) He has been a plant engineer for Apex Bolt Company for the past 13 years. His job is to "trouble shoot" and to correct faults and deficiencies in the machinery. His wife has been a part-time office worker for the YMCA for the past 5 years. (R. 906, 907)

9) John Hayes:

He lives in Oak Lawn, Illinois, and he works as a printing superintendent at Corn Products Company. (R. 946, 947)

10) Paul Grady:

He has lived in Maywood for the past 17 years (R. 962), and he has been a salesman in Chicago for the past 24 years. (R. 962, 963)

11) Wat Cluverius:

He lives at a Chicago address (R. 1006), and he has worked at a paper company for 14 years and is presently a manager. (R. 1007)

12) Ned Calderone:

He lives in Bellwood, Illinois, and has been a mechanic for Commonwealth Edison for the past 14 years. (R. 1022)

Getting back and summarizing, however, the purpose of this particular argument is to show that there was no arbitrary exclusion of any identifiable group of qualified jurors, and to show further that the cases dealing with deliberate exclusion are not applicable. It is perhaps appropriate to note that there were policy considerations present in those "deliberate exclusion" cases which are not present here. In most of those cases the facts were that a group of individuals, who were generally qualified to serve as jurors, were excluded prior to the time that they ever appeared for jury duty by the arbitrary action of jury commissioners. Such situations—where a state official is able by his actions to arbitrarily prescribe who shall or shall not appear for jury duty, without any regard to the qualifications of those excluded—present grave possibilities of abuse. Such possibilities of abuse are not presented by the Illinois practice of excluding scrupled individuals from jury duty. In such cases all qualified individuals are called for service without regard to their scruples or lack thereof, and they are excused only after they indicate on *voir dire* examination an inability to render a fair and impartial verdict. Such *voir dire* examination goes on in the defendant's presence, and at any time he can attempt to show that the juror's feelings are not strong enough to preclude the juror from render-

ing a fair verdict. The defendant further can object that the exclusion of any one individual is not warranted and will deprive him of a fair trial, and he can exercise peremptory challenges to excuse anyone that he even suspects of bias. All of these courses of action were available to the defendant in this case, and the facts of the case do not warrant application of the principles enunciated in cases where this Court found an arbitrary exclusion of qualified individuals.

Although the cases previously discussed do not apply, the petitioner has seized upon the *rationale* of those cases and has argued that he is entitled to a "representative" jury. He further argues that those having scruples against the death penalty are a large portion of the community, and that exclusion of those persons denies him of this "cross section" jury. This theory is not supported by any previous decision of this Court, since this Court has disclaimed the necessity of proportionate representation as an end in itself. [See cases discussed in *United States* v. *Dennis,* 183 F. 2d 201 (2nd Cir. 1950) (Judge Learned Hand), *affirmed,* 341 U.S. 494]. Even in the cases relied upon by the petitioner to support this argument, this Court has expressly said that any one jury need not be representative of all groups or be a perfect mirror of the community. [*Thiel* v. *So. Pacific Co.,* 328 U.S. 217 (1946); *Swain* v. *Alabama,* 380 U.S. 202, 208 (1965)]. The argument made on petitioner's behalf—that death scrupled jurors are more compassionate and therefore must be present on the jury to insure defendant a fair trial—is very similar to the contention made and rejected in *Hoyt* v. *Florida,* 368 U.S. 57 (1961). In *Hoyt* a woman defendant, convicted of murder, argued that the presence of woman jurors was essential to guarantee her a fair trial, because woman jur-

ors would have been more understanding and compassionate than men in assessing her act and her defense of temporary insanity. In holding that there had been violation of the Fourteenth Amendment, this Court commented on the defendant's argument:

> "these premises misconstrue the scope of the right to an impartially selected jury assured by the Fourteenth Amendment. That right does not entitle one accused of crime to a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant, or to the nature of the charges to be tried. It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusion." (368 U.S. at 59)

From these cases it is apparent that petitioners claim to a "representative" jury is without support in the law, and it is similarly without support in logic.

The traditional and century old concept of an "impartial jury", which is capable of rendering a true verdict on the law and the evidence, is the foundation of other basic principles of American jurisprudence. One such principle—which is accepted and followed in the great majority of, if not all, states—is that the verdict in a criminal case must be unanimous. In *Andres* v. *United States* [333 U.S. 740 (1948)], where this Court said that a jury's verdict must be unanimous both as to guilt and as to punishment in a murder prosecution, this Court said that such a construction of the federal statute involved was more consonant with the "history of the Anglo-American jury system." (333 U.S. at 749). If the notion of an "impartial" jury is to be replaced by that of a "representative" jury, then principles such as unanimity of verdict must also be re-evaluated. The only other alternative is a serious disrup-

tion of all state criminal trials. A "representative" jury as envisaged by the petitioner would be a partisan jury, which would in almost all cases work to a defendant's advantage and would almost always preclude any conviction. For example, if petitioner were charged with civil rights violations arising from the murder of civil rights workers, and if he were being tried in a Southern state before a "representative" jury, the People suggest that he would never be convicted.

Furthermore, if the traditional concept of an "impartial" jury—which has the gloss of judicial interpretation and which is generally understood—is to be replaced with the concept of a "representative" or "cross-section" jury, a trial which might be constitutional when tried might not be constitutional when it is reviewed by this Court. The statistics in regard to those favoring or opposing the death penalty provides an illustration. In 1936 sixty-two percent of the population favored the death penalty as opposed to thirty-three per cent against it. In 1953 those favoring the death penalty had risen to sixty-eight per cent of the population, as opposed to twenty-five per cent. In 1960, at the very time when petitioner was convicted of murdering the policeman, fifty-one per cent were in favor of capital punishment for murder and thirty-six per cent were opposed. While a little less than fifty per cent of the prospective jurors in this case were excused for having religious or conscientious scruples, only one hundred and two prospective jurors out of six hundred and nine were excused for the same cause in a recent and notorious prosecution in Illinois.* In the Arizona pros-

* This was the case of *People v. Speck*, 67-y-20-27, Circuit Court, Peoria County, where the defendant was convicted of killing 8 nurses. The figures as to jurors excused were supplied by the trial judge.

ecution against Rebecca Madden (who has been granted leave to file an amicus curiae brief), only eleven potential jurors out of a total panel of fifty-three were eliminated because of their objection to the death penalty. (Brief of Rebecca Madden, p. 4). In the companion case of *Bumpers* v. *North Carolina,* sixteen out of fifty-three were similarly excluded. (Brief of NAACP Legal Defense and Education Fund, p. 5).*

The point of all this is, first, that the idea of a "representative" jury is a totally unworkable concept, and secondly, that constitutional "fairness" would be determined by public opinion polls if such a concept were adopted. This idea that a prejudice is entitled to be represented on the jury when it is prevalent enough is a dangerous concept, contrary to our idea of equal justice for the unpopular defendant as well as the popular one. The People submit that no such a radical change in our law is warranted by this case.

In summary, the federal constitution requires only that jurors be drawn indiscriminately from those eligible in the community for jury service, untrammelled by any arbitrary exclusions. The jurors in the case at bar were, in fact, drawn indiscriminately from those eligible in the community, and the exclusion of those who were unable to render an impartial verdict was not arbitrary in any way. The so-called right espoused by the petitioner of a

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* Such a discrepancy between the percent of those excused in a case, as opposed to the percentage of the population opposing the death penalty, suggests two things: first, that although a large portion of the population may at this time be generally opposed to capital punishment, some of these individuals do not have such scruples as would disqualify them from jury duty; secondly, that the numbers fluctuate in any community as a result of some particular crime.

"representative" or "cross-section" jury finds no support in either law or logic.

CONCLUSION

One of the most basic and traditional concepts in American Law has been the idea of trial by an "impartial jury". Since the early days of our Country, both federal and state courts have furthered this concept by excluding all individuals who were so biased that they could not render a verdict on the law and the evidence, whether that bias was for the government or for the defendant. In the case at bar, this tradition was carried on by excluding those individuals whose bias as to the death penalty prevented them from imposing it under any conditions. The exclusion of such scrupled individuals was a reasonable one, supported by statutory or case law of forty-four jurisdictions and there was no arbitrary action such as would violate the federal constitution. The petitioner failed to show that he was deprived of a fair trial on the question of guilt or innocence by the procedures followed, and the record showed, rather, that his guilt was determined by twelve impartial and representative jurors. For these reasons, the People of the State of Illinois ask that the decision of the Illinois Supreme Court be affirmed.

Respectfully submitted,

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APPENDIX A.

VOIR DIRE EXAMINATION

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
1)	Clifford Salazar	636	644	State	Scruples
2)	Joe Sanders	645	674	Defendant	Peremptory
3)	Carrie B. McCray	651	667	State	Peremptory
4)	Ruth Anna O'Reilly	655	675	Defendant	Peremptory
5)	Bertha Pritchard	660	661	State	Scruples
6)	Peter F. Cosenza	661	662	State	Scruples
7)	John M. Kriz	662	674	Defendant	Peremptory
8)	Violet C. Layman	667	668	Court	Scruples
9)	Victoria Hetzel	668	675	Defendant	Peremptory
10)	Helen Heimann	675	728	State	Peremptory
11)	Casimir A. Mlyniec	682	685	State	Scruples
12)	Oleh Kuritza	685	686	State	Scruples
13)	Genevieve Wisniewski	686	687	State	Scruples

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
14)	Marie Stella	687	697	Defendant	Peremptory
15)	Julia Darcy	697	715	State	Scruples
16)	Erna Formanek	701	728	State	Peremptory
17)	Blanche Carlson	705		Accepted as Juror	
18)	Mary Scolaro	723-A	724	State	Scruples
19)	Cecelia Lohmeier	724		Accepted as Juror	
20)	Beatrice Duncan	729	729	State	Scruples
21)	John Boortz	730	730	State	Scruples
22)	Vito Matthew Calamia	734	752	State	Peremptory
23)	Lloyd Bohl	739	739	State	Scruples
24)	Victoria Blaha	739		Accepted as Juror	
25)	John Ahlert	742	743	State	Scruples
26)	Dorothy Andrews	742	743	State	Scruples
27)	Edward Barmann	742	743	State	Scruples
28)	Carmelia Alisauskas	742	743	State	Scruples
29)	Austin Hart	742	743	State	Scruples
30)	James Wilson	742	744	State	Scruples
31)	Viola Awe	744	744	State	Scruples

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
32)	Prospective Juror 213	744	745	Court	Scruples
33)	Prospective Juror 243	752	752	Court	Scruples
34)	William Beuke	752		Accepted as Juror	
35)	Kenneth Stuebe	764	798	Defendant	Peremptory
36)	Ernest Sparrow	764		Accepted as Juror	
37)	John Biesiada	777	788	State	Peremptory
38)	Herbert Krumwiede	783	806	Defendant	Peremptory
39)	Prospective Juror 159	788	788	State	Scruples
40)	Hazel Sedivy	789	823-A	State	Peremptory
41)	Myrtle Sowell	803	806	Defendant	Peremptory
42)	Prospective Juror 140	806	806	Court	Scruples
43)	Prospective Juror 137	807	807	Court	Scruples
44)	Prospective Juror 131	807	807	Court	Scruples
45)	Alma Ruff	808		Accepted as Juror	
46)	Patricia Schricker	811	856	State	Peremptory
47)	Prospective Juror 129	823-A	823-A	Court	Scruples
48)	Prospective Juror 188	823-A	824	Court	Scruples
49)	Prospective Juror 114	823-A	824	Court	Scruples

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
50)	Richard Oesterlin	824	830	Defendant	Peremptory
51)	Prospective Juror 66	830	830	Court	Scruples
52)	Rose Mascia	831	841	State	Peremptory
53)	Prospective Juror 33	841	841	Court	Scruples
54)	Prospective Juror 14	841	842	Court	Scruples
55)	Prospective Juror 9	842	842	Court	Scruples
56)	Prospective Juror 241	848	848	Court	Scruples
57)	Aletha Kreis	850	867	Defendant	Peremptory
58)	Prospective Juror 226	856	857	Court	Scruples
59)	Prospective Juror 223	857	857	Court	Scruples
60)	Etta Burda	858	877	Defendant	Peremptory
61)	Prospective Juror 187	868	868	Court	Scruples
62)	Prospective Juror 169	868	868	Court	Scruples
63)	Lorraine Wozniak	869	889	State	Peremptory
64)	Prospective Juror 161	877	877	Court	Scruples
65)	Prospective Juror 160	877	877	Court	Scruples
66)	John Tolan	878	892	Defendant	Peremptory
67)	Fred Racine	890		Accepted as Juror	

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
68)	Prospective Juror 143	892	892	Court	Scruples
69)	Prospective Juror 119	893	893	Court	Scruples
70)	Esther Pass	896	899	State.	Peremptory
71)	Paul G. Ongena	900	904	Defendant	Cause
72)	Albert Klein	904		Accepted as Juror	
73)	Frank Morrison	913	944	Defendant	Peremptory
74)	Nancy Kenney	916	944	Defendant	Peremptory
75)	Rachel McKee	920	924	State	Peremptory
76)	Harold E. Klapp	922	944	Defendant	Peremptory
77)	Catherine Johnson	924	928, 929	Court	Couldn't be fair and impartial, but no reason given
78)	Helen Jedinak	929	932	State	Cause
79)	Sylvia Hybiak	933	937	State	Peremptory
80)	Richard Holzhausser	937	944	Defendant	Peremptory
81)	Prospective Juror 86	944	944	Court	Scruples

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
82)	John Hayes	946		Accepted as Juror	
83)	Herbert Gross, Jr.	952	990	State	Peremptory
84)	Lionel Greco	957	966	State	Peremptory
85)	Paul Grady	962		Accepted as Juror	
86)	Agnes Giles	967	969	Defendant	Cause
87)	Carl Gehrke	969	1017	State	Peremptory
88)	Prospective Juror 70	990	991	Court	Scruples
89)	Marie Flanagan	991	998	State	Peremptory
90)	Harry Fiset	999	1005	Defendant	Peremptory
91)	Prospective Juror 63	1005	1006	Court	Scruples
92)	Wat T. Cluverius	1006		Accepted as Juror	
93)	Prospective Juror 46	1017	1017	Court	Scruples
94)	Prospective Juror 40	1018	1018	Court	Scruples
95)	Ned Calderone	1020		Accepted as Juror	

Totals

95 prospective jurors examined.

46 jurors excused for cause because of religious or conscientious scruples.

12 jurors accepted (4 women, 8 men).

17 jurors excused by peremptory challenges by defendant.

16 jurors excused by peremptory challenges by prosecution.

2 jurors excused for cause by defendant.

1 juror excused for cause by prosecution.

1 juror by court on its own motion when she stated she couldn't be fair and impartial.

APPENDIX B.

EXCERPTS FROM PUBLIC OPINION POLLS ON CAPITAL PUNISHMENT

Gallup Public Opinion News Service (Dated March 22, 1960)

The case of Caryl Chessman, the convicted kidnapper sentenced to die May 2, has renewed a worldwide debate: should capital punishment be abolished?.

The latest Gallup Poll survey finds 51 per cent of the American public is in favor of the death penalty for persons convicted of murder.

This marks a sharp drop from a previous measurement in November, 1953, which showed 68 per cent approving capital punishment for murder.

In April, 1936, when the Gallup Poll first sought the opinion of the American public on this issue, it was found that 62 per cent believed persons convicted of murder should be sentenced to death.

Across the nation, Gallup Poll reporters in the latest survey sought to determine how typical citizens line up today on the issue of capital punishment for murder.

Here is the question asked of people in all walks of life:

"Are you in favor of the death penalty for persons convicted of murder?"

Following are the results of the latest survey, compared with findings from the surveys in 1953 and 1936:

Favor Death Penalty for Murder?

	Today	1953	1936
Yes	51%	68%	62%
No	36	25	33
Undecided	13	7	5

Gallup Public Opinion News Service
(Dated March 24, 1960)

A marked decline in the number of people who favor the death penalty for murder has been found in both the U. S. and Canada.

Surveys taken in the two countries at seven-year intervals show a remarkably similar trend. In the latest U. S. Gallup Poll, 51 per cent of the general public is shown to favor capital punishment; in 1953, the figure was 68 per cent.

In Canada, the Gallup Poll finds the same slim majority, or 51 per cent, approving of the death penalty today. The 1953 measurement there showed 71 per cent.

The following table illustrates the similarity of opinion in the two countries:

Favor Death Penalty for Murder

U. S.

	Today	1953
Yes	51%	68%
No	36	25
Undecided	13	7

Canada

	Today	1953
Yes	51%	71%
No	41	22
Undecided	8	7

APPENDIX C.

EXCERPTS FROM VOIR DIRE EXAMINATION

900 *Paul G. Ongena*

* * * * *

MR. KISSANE: Q. Have you ever appeared as a witness or a party in any type of a legal proceeding?

901 A. No, sir.

Q. Have you ever served as a juror before?

A. No, sir.

Q. Having in mind the questions asked of all the preceding jurors, did anything come to your mind that indicated to you you cannot be a fair and impartial juror?

A. Just one thing here. My brother's son-in-law is a policeman.

THE COURT: Well, the question is: Does that—

MR. KISSANE: Q. Would that make you a fair and impartial juror?

A. I don't think it would affect me, no, sir.

Q. Sometimes we have people sitting there who, for some reason or other, there is something in their life that we could never think of, in asking questions, that would affect their service here and that's why we ask that general question.

902 A. I don't believe so.

* * * * *

Examination by Mr. Shelton.

903 Q. When, Mr. Ongena, even though a member of your immediate family is a police officer, you said, I believe, "I don't believe so," it would lead me to believe that there is just a little bit of reservation in that statement. Are you absolutely certain in your own mind you could be fair?

A. I'm not certain.

MR. SHELTON: Cause, your Honor.

THE COURT: Q. You feel that it might influence your verdict?

A. It might.

THE COURT: I think you're right to volunteer that information. We want twelve men and women who are absolutely fair and impartial. If, from what you heard about the case so far, you feel that there's a chance you might be prejudiced one way or another, you won't be a fair juror.

All right, you may step aside. That's all.

MR. SHELTON: Thank you, Mr. Ongena.

(Prospective juror excused.)

929 *Helen Jedinak*

(Prospective Juror 97)

THE COURT: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

PROSPECTIVE JUROR 97: Yes, I do.

THE COURT: You do?

PROSPECTIVE JUROR 97: Yes, I do.

THE COURT: You don't believe in the death penalty?

PROSPECTIVE JUROR 97: No. It's just that I wouldn't want to be responsible.

THE COURT: That isn't it. No. Maybe you don't like to be a juror at all, but, then, that's your duty as a citizen. Now, answer my question: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

PROSPECTIVE JUROR 97: No, I haven't.

THE COURT: All right, take a seat.

HELEN JEDINAK, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

930 Q. The lady who just came into the jury box. Your name, please?

A. Helen Jedinak.

* * * * *

Q. Well, as you sit there now, knowing your past experience in life, is there anything that indicates to
931 you you cannot be fair and impartial?

A. Not in my past experience, no.

Q. Is there something in your frame of mind that indicates to you you cannot be fair and impartial? Now's the time to tell us.

932 A. That's right, that's right. Right now my frame of mind.

Q. You feel you cannot be fair and impartial, is that correct?

A. That's right.

MR. KISSANE: I submit, Judge, she said she cannot be fair and impartial.

THE COURT: Challenge for cause?

MR. KISSANE: Yes, Judge.

APPENDIX D.

Excerpts from "An Investigation Into Certain Personality Variables Among Capital Trial Jurors." by Robert Francis Crosson, 1966.

I. STATEMENT OF THE PROBLEM

The Contention

In American law the death penalty is nearing extinction. Of the fifty states thirteen are without capital punishment now, but within a decade or two all or most will very likely have abolished it.. Even in those states retaining capital punishment the trend of reduced frequency of executions suggests "de facto", if not statutory abolition. The death penalty has been a matter of controversy for centuries and in America itself an abolition movement began almost at the moment of the nation's founding (Cahn, 1957). Official killing by the state has been defended and condemned on a variety of grounds: In the name of morality and religion, in appeals to men's intelligence, practical wisdom, and political judgment, in appeals to superstition, retribution, and economics. In what has been a slow abolition process the seeming barbarity of the penalty has been illuminated and emphasized by the great essays and studies which have appealed to the higher instincts of man (e.g., by Writers—Camus, 1956; Koestier, 1957; Beccaria, 1872; by concerned jurists—Cardozo, 1947; Frank, 1957; Frankfurter, 1956; and by social scientists—Sellin, 1962; Weihofen, 1955). A recent book which presents the arguments surrounding capital punishment, both pro and con is *The Death Penalty in America,* edited by

Bedau (1964). This book contains in addition to a compilation of articles contributed by many writers from different fields, an excellent bibliography on the subject. The barbarity of the penalty affronts the civilized sensibilities of increasing numbers of people. And occasionally the popular press joins the voices of abolition (see *Newsweek,* March 8, 1965, pp. 26, and *Nation,* March 15, 1965, pp. 266). However, some of the mechanics of the judicial process by which the death penalty is levied have not been subject to public scrutiny and in fact have even been neglected by students of law. An extremely important aspect of the process, namely the jury impaneling procedures in capital trials has been reviewed by a professor of law, Walter E. Oberer, writing in a recent issue of an opinion journal (1964) an abstract of a law journal article published earlier (1961). Oberer contends that capital juries, because of voir dire challenges for scruples against the death penalty, are composed of individuals whose attitudes are inimical to the defendant's case. He believes specifically that the capital jury is comprised of "authoritarian personalities" (Oberer, 1961, p. 552). It is this contention of selective personality patterns in the jury which gives the matter psychological importance and which prompted the present study. Based on the personality trait constellation described in the *Authoritarian Personality* (Adorno, et. al., 1950), Oberer views the capital jury as consisting of individuals having the following personality pattern: moralistic condemnation; extrapunitiveness; distrust-suspicion (people threatening, victimization, survival of the fittest idea, world as a jungle); hierarchical conception of human relations, non-love-seeking, exploitive-manipulative opportunism (Oberer, 1961, p. 565). If it can be shown that Oberer's opinion of authoritarian jury compo-

sition in capital trials has validity then his contentions seriously challenge the due process and fair trial guarantees in American jurisprudence and as provided in the Constitution of the United States.

Very little research has been done in the study of juries, jury processes, and jury membership. There is currently some considerable work being done at the University of Chicago Law School in an experimental jury project, some of the results of which have already been published and are reviewed in a later section. A search of the literature reveals that Strodtbeck and his associates are responsible for most of the studies of juries from a psychological standpoint and these mainly have social psychological focus, viz., group functioning and process (Strodtbeck, 1962), social status (Strodtbeck, James, and Hawkins, 1958), social dimensions (Strodtbeck, and Hook, 1962), sex role differentiation (Strodtbeck and Mann, 1956), status and competence in jury deliberations (James, 1959a), evaluation of testimony by jurors (James, 1960), and interaction and coalition developments in juries (Hawkins, 1960). These will be mentioned again in the literature review. Not a single study could be found which examined personality factors among jury members except for some indirect studies of juror competency (e.g., James, 1959a), a most disturbing circumstance in light of Oberer's remarks. The need for such a study is even more compelling when one studies Oberer's line of argument, for his critique develops out of an attack upon the "internal logic of capital trials." The urgency for examining capital jurors for possible selective and consistent personality traits which might render capital jurors less than impartial evolves from Oberer's reasoning. If the voir dire contains procedures which systematically bias the jury against a defendant whose very life depends on that

jury, then the voir dire should be modified to conform to the ideals of blind justice and impartial review. The fact that no social scientist has looked directly into personality factors among jurors is remarkable and disturbing in view of the vital importance of the judgments of such groups. The psychological relevance as well as the lethal urgency of the contention becomes apparent in the following line of argument.

• • •

Purpose

The purpose of the present study is to investigate the contentions as developed. This is an applied study, using psychological techniques and knowledge. It is not intended or designed as a theoretical work. If it is demonstrated that a segment of the citizenry antagonistic to any degree toward the defendant is consistently and systematically selected for capital jury service, then clearly the voir dire in capital cases should be re-analyzed with the view to restructuring the procedure consistent with fair trial ideals. If the contentions are not supported by research then the assumptions can be made that either, 1) the research design was not adequate or sensitive enough to measure the variables under question, or, 2) the American voir dire system has in fact been consistent with fair trial ideals.

The questions to be answered in this study can be framed as follows: Are capital jurors inclined to be more authoritarian than jurors excused from duty because of death scruples? Does the voir dire in capital cases tend to eliminate jurors most capable of evaluating verbal evidence and arguments? And does the willingness to impose the death penalty reflect a relatively higher level of manifest hostility?

• • •

The Hypotheses

The questions posed earlier can be rephrased to provide the hypotheses underlying this research. They are stated in null form.

H1 Death qualified jurors will not be as dogmatic as death scruples jurors.

H2 Death qualified jurors will not be as opinionated as death scruples jurors.

H3 Death qualified jurors will not be as conservative as death scruples jurors.

H4 Death qualified jurors will not be less critical in thinking than death scruples jurors.

H5 Death qualified jurors will not be as manifestly hostile as death scruples jurors.

• • •

In terms of the null hypotheses tested in this research the results and conclusions for the central focus of this investigation can be summed up as follows:

H1 Death qualified jurors will not be as dogmatic as death scruples jurors. (Rokeach Dogmatism Scale)

Conclusion: The difference between juror groups was not significant; therefore the null hypothesis cannot be rejected. The predicated direction of difference (DQ < DS in dogmatism) was observed, however.

H2 Death qualified jurors will not be as opinionated as death scruples jurors. (Rokeach Opinionation Scale)

Conclusion: No difference between juror groups was observed; therefore the null hypothesis cannot be rejected.

H3 Death qualified jurors will not be as conservative as death scruples jurors. (Rokeach Conservatism-Liberalism subscale)

Conclusion: The death qualified jurors were significantly more conservative than the death scruples jurors; therefore the null hypothesis is rejected.

H4 Death qualified jurors will not be less critical in thinking than death scruples jurors. (Watson-Glaser Critical Thinking Appraisal)

Conclusion: The death scruples jurors were not significantly less critical in thinking than the death scruples jurors, but the difference between the groups was high enough to leave non-rejection of the null hypothesis open to question even though statistical purity requires that the null hypothesis not be rejected.

H5 Death qualified jurors will not be as manifestly hostile as death scruples jurors. (Siegel Manifest Hostility Scale)

Conclusion: The difference between juror groups was not significant; therefore the null hypothesis cannot be rejected. The predicted direction of difference (DQ $\vee$ DS in manifest hostility) was observed, however.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois.

Respondents.

(On Writ of Certiorari to the Supreme Court of Illinois)

BRIEF OF RESPONDENT JOSEPH WOODS, Sheriff of Cook County, Illinois.

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IN THE

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OCTOBER TERM, 1967

NO. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois.

Respondents.

(On Writ of Certiorari to the Supreme Court of Illinois)

BRIEF OF RESPONDENT JOSEPH WOODS, Sheriff of Cook County, Illinois.

QUESTION PRESENTED

Whether the excusing for cause of all prospective jurors who expressed conscientious or religious scruples against the infliction of the death penalty deprived petitioner of a jury which fairly represented a cross section

of the community and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

On April 24, 1959, petitioner drove his car from Detroit to Chicago. (R. 1421-30, A. 133-34).* There were at this time outstanding arrest warrants charging petitioner with two armed robberies, April 19, and April 22, 1959, in Wayne County, Michigan. (R. 1282-83, A. 72-80). Upon his arrival in Chicago petitioner and a companion had a pistol and a quantity of stolen jewels. On April 27, a federal warrant charging petitioner with unlawful flight to avoid prosecution was issued by a United States District Court in Michigan. (R. 1284, A. 81-86). On the evening of April 28, the petitioner and his companion arrived at the vicinity of 11th Street and Wabash Avenue in Chicago. Petitioner was carrying the loaded pistol brought from Detroit. (R. 1428-32, A. 134-35); he testified he had the loaded pistol on his person for 10 to 12 hours (Abst. 137, R. 1441) as he traveled about Chicago. He then met with a Helen Murray at a tavern and, according to different versions told by petitioner, he either gave her $50.00 to spend the evening with him or sought her aid in securing a fence for the stolen jewels. (R. 1430, A. 134; R. 1293, A. 91; R. 1390, A. 123). Around 4:00 A.M. the petitioner and Helen Murray began to argue on the sidewalk outside a restaurant they had just left. Petitioner grabbed Miss

* "A" refers to the Abstract filed by petitioner on his original appeal to the Illinois Supreme Court.

Murray but she pulled free and ran to a nearby cruising police car which had stopped on its beat for a red light. She told uniformed Officers Stone and Marzillo that petitioner was carrying a gun. She pointed at the petitioner (R. 1396) (R. 1056-7) The petitioner, hearing the conversation fled and was chased by Officer Stone to a parking lot. (R. 1052-1058, A. 5, 6, 9) (R. 1066-76, A. 8-11) (R. 1294, A. 92). Petitioner hid in a trailer. Officers Marzillo and Stone flashed their flashlights into the lines of parked trucks and (A. 6; R. 1058-9) suddenly petitioner jumped down and started to run with Officer Stone in pursuit and yelling at Witherspoon (A. 7, R. 1058). Petitioner ran a block and a half to another parking lot where he again hid in a trailer. Officer Stone came to the lot, began searching the trailers, flashing his flashlight, he caught the defendant in his hiding place, saying: "You've got a gun. The girl told me. I want it." (A. 127; R. 1401-2) He then conducted what petitioner called a "very bad" search of petitioner and failed to find a gun. The officer told petitioner to get out of a trailer in which he had hidden. (R. 1400-03, A. 126-27) (R. 1295, A. 93). Then in petitioner's words, "as I approached the policeman, I fired a shot at him." (R. 1268-69, A. 66-67). After this petitioner and the officer exchanged shots, petitioner kicked the wounded officer's hand and knocked the officer's service revolver from his grasp. Petitioner testified he was "interested in getting out of the area quickly" (A. 138; R. 1449). He further testified "the only one I was concerned about that night was Witherspoon" (A. 139; R. 1450). Petitioner fled to a gas station where he had previously parked his car. He made no effort to help or to secure medical aid for the dying officer. (R. 1450, A. 139) (R. 1075-76, A. 10-11) (R. 1135-37, A. 25) (R. 1297, A. 94)

(R. 1403, A. 127). However, rather than going to his car he asked the gas station attendant to call a cab. (R. 1448-9; A. 138) He hid the gun in a toilet flush tank at the station when he saw police approaching. He was taken in custody (R. 1405-07, A. 128) and brought to a hospital where the dying Officer Stone identified him as "the man that shot me." (R. 1062, A. 8). Officer Marzillo also identified petitioner (R. 1109-10, A. 19) who was then taken back to the gas station. On the way he admitted that he shot Officer Stone and at the gas station he identified the gun which police found in the flush tank as the gun with which he shot Officer Stone. (R. 1110-11, A. 19, R. 1120-21, A. 22). Then petitioner was taken to police headquarters where he explained the shooting in these terms: "The officer was doing his job and it was my job—I was trying to avoid arrest (R. 1450, 1297, A. 94, 139). I had a job to do. I was hot and I didn't want to be taken in. I was wanted for robberies in Detroit, I had been in the penitentiary before and I didn't want to go back, that's why I shot." (R. 1228, A. 54). After giving these statements, petitioner went to sleep and on his awakening he inquired as to the health of Officer Stone and was informed that Stone had died. (R. 1468, A. 143). He refused to sign or give any further statements thereafter.

Petitioner was indicted in October, 1959 and was tried in April, 1960. He was represented by three court-appointed counsel. The jury was selected from a venire of ninety-five persons. Forty-seven persons were excused because of religious or conscientious scruples against inflicting the death penalty. Three were excused because of lack of fairness or impartiality. The prosecution used fifteen and the defense used eighteen of their allotted twenty peremptory challenges. Petitioner did not challenge for cause any

of the jurors finally selected to try him. Petitioner did not object to the court's action in excusing any juror for cause nor did petitioner object to the form of questioning used to determine death penalty scruples. Petitioner did not seek to examine further any jurors expressing scruples against the death penalty.

The trial ended on April 20, 1960, with the jury's verdict finding petitioner guilty and fixing his punishment at death. On April 25, 1960, judgment was entered on the verdict.

The subsequent course of litigation is summarized briefly by petitioner. A more detailed summary and a more detailed statement of the facts of the crime are found in Respondent's Brief In Opposition to the Petition For certiorari.

SUMMARY OF ARGUMENT

Every federal court and nearly every state has allowed the prosecution to challenge for cause in a capital case any juror who has conscientious or religious scruples against inflicting the death penalty. The petitioner attacks this procedure on three grounds: first, that the excusing of such jurors is without rational foundation; second, that the resulting jury is not a representative jury, and third, that the resulting jury is not a fair and impartial jury.

The excusing of jurors with conscientious scruples against inflicting capital punishment has a clear rational foundation. The very meaning of a conscientious scruple imports the presence of a belief of such nature as to impede ability to render a fair and impartial verdict in a capital case. The petitioner never objected to the excusing of any juror for cause and never sought to ques-

tion any juror to clarify any doubt about the meaning of the juror's scruples. Further, in the light of the questioning of several jurors which was heard by all jurors present in the courtroom, the jurors who said they had conscientious scruples may be assumed to have known what the court was seeking in its questioning. If the answers given by the veniremen were given in response to questions about the presumption of innocence or the insanity defense or willingness to refuse to give the death penalty the petitioner would be entitled to a challenge for cause.

The jury was a representative jury. No deliberate effort was made to exclude persons of any race, religion, political party, sex or economic class. Those who have death penalty scruples do not constitute the kind of class whose arbitrary exclusion is disapproved by this Court. In any event the exclusion is not arbitrary, being based upon the State's legitimate interest in enforcing its criminal laws. The use of public opinion polls to support petitioner's argument is improper and insubstantial. If a party's right to challenge for cause rests on poll results, then the rights of parties must necessarily fluctuate with day to day changes in poll results.

The jury that tried petitioner was fair and impartial. Each juror swore to his fairness and each juror was either tendered or accepted by petitioner without challenge for cause. The studies offered by petitioner do not reveal that the jurors were in fact unfair. One study actually supports the notion that there is no statistically significant difference between jurors with and without death penalty scruples. The reliance of petitioner on the concept of the authoritarian personality is misplaced since the existence of such a personality depends on much more than the presence or absence of scruples against capital punishment. Every court faced with these arguments has rejected them.

The State had a legitimate interest in using a single jury to decide questions of guilt and punishment. The use of a bifurcated trial or of judicial sentencing will not eliminate the use of challenges for cause against jurors with death penalty scruples. The alternative procedures suggested by petitioner probably operate to the detriment of a defendant on trial for his life. The vast majority of states as well as the federal jurisdiction use the Illinois procedure in capital cases.

The petitioner's argument is an attack on the present voir dire method of selecting a jury. If petitioner's argument is accepted, the notion that fairness can be determined by simple direct questions to a venireman under oath must yield to a program of psychological testing of the venire with a psychologist rather than a judge determining the fitness of a juror. Certainly the juror qualification statutes prevalent in all states could not stand against a psychological attack. Further, the assumption underlying the petitioner's argument is that a defendant has the right to have a jury nullify the law. No man should have this right. If a defendant did possess this right, then it is doubtful that a single conviction could be obtained under laws with which a fairsized body of citizens are in disagreement. The most notable example of this is trials involving or arising out of civil rights violations in certain regions of this country.

ARGUMENT

I.

THE PETITIONER WAS TRIED BY TWELVE FAIR AND IMPARTIAL JURORS DRAWN INDISCRIMINATELY FROM AMONG THOSE ELIGIBLE IN THE COMMUNITY FOR JURY SERVICE, UNTRAMMELLED BY ANY ARBITRARY EXCLUSIONS.

A. Introduction.

The disqualification in a capital case of jurors having conscientious or religious scruples against inflicting the death penalty was first recognized by Mr. Justice Story in United States v. Cornell, 25 Fed. Cas. 650, 655-56; No. 14, 868 (C.C.R.I.) (1820). In 1827, the first state court faced with the issue sustained the right of the prosecution to challenge such a juror. Commonwealth v. Lesher, 17 Serg. & Rawles, 155 (Pa. 1827). In 1857 an English court of review stated that such conscientious scruples were a ground of challenge. Mansell v. The Queen, 8 El. & Bl. 54, 120 Eng. Rep. 20, 32, 41, 42 (Exchequer Chamber). This Court held that a juror having conscientious scruples concerning the death penalty does not stand indifferent between the government and the accused and is not an impartial juror. Logan v. United States, 144 U.S. 263, 298 (1892). By virtue of common law or statute or both nearly every state of the Union has similarly recognized the inability of a juror with conscientious scruples against the death penalty to serve fairly as a juror in a capital case.[1]

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1. UNITED STATES:
United States v. Puff, 211 F. 2d 171, 181-86 (2nd Cir. 1954) cert. denied 374 U.S. 963 (Common law)

The petitioner argues that these cases must be overruled because an individual who does not have conscien-

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Pope v. United States, 372 F. 2d 710, 724-25 (8th Cir. 1967) (Common law)
United States ex rel Dukes v. Sain, 297 F. 2d 799, 802-03 (7th Cir. 1962) cert. den. 369 U.S. 868

ALABAMA:
Garrett v. State, 76 Ala. 18, 20-21 (1884) (Statute)
Logan v. State, 251 Ala. 441, 443, 37 So. 2d 753, 754-55 (1948) (Statute)
Alabama Code, tit. 30, Sec. 57 (1958)

ARIZONA:
State v. Thomas, 78 Ariz. 52, 58, 275 P. 2d 408, 412 (1954) (Common law)
Ariz. Code, Crim. Proc. Rule 219 (A) (14) (1956)

ARKANSAS:
Jones v. State, 58 Ark. 390, 397, 24 S.W. 1073, 1075 (1894) (Statute)
Williams v. State, 186 Ark. 738, 739, 55 S.W. 2d 928, (1933) (Statute)
Ark. Stat. Ann. Sec. 43-1920 (1964)

CALIFORNIA:
People v. Tanner, 2 Cal. 257, 260 (1852) (Statute)
People v. Riser, 47 Cal. 2d 566, 575-76, 305 P. 2d 1, 7 (1956) appeal dismissed 358 U.S. 646 (1958) (Statute)
Cal. Penal, Sec. 1074 (1956)

COLORADO:
Demato v. People, 49 Colo. 147, 149, 111 Pac. 703, 704-05 (1910) (Common law)
Bell v. People, 431 P. 2d 30, 31-32 (Colo. 1967) (Common law)

DELAWARE:
State v. Windsor, 5 Del. 512, 513 (1851) (Common law)
Del. Code Ann. Tit. 11, Sec. 3301 (1953)

DISTRICT OF COLUMBIA:
Funk v. United States, 16 App. D. C. 478, 488-89 (1900) cert. denied 179 U.S. 683 (Common law)
Turberville v. United States, 303 F. 2d 411, 418-21 (D. C. Cir. 1962) cert. denied 370 U.S. 946 (Common law)

FLORIDA:
Metzger v. State, 18 Fla. 481, 486 (1881) (Statute)
Piccott v. State, 116 So. 2d 626 (Sup. Ct. Fla. 1959) cert. denied 364 U.S. 293 (1960) (Statute)
Fla. Stat. Ann. 932.20 (1944)

tious scruples against the death penalty is not a fair and impartial juror in a capital case. It is surprising that the

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GEORGIA:
Williams v. State, 3 Ga. 453 456-58 (1847) (Common law)
Massey v. State, 222 Ga. 143, 151, 149 S.E. 2d 118, 124 (1966) cert. denied, 385 U.S. 36 (Statute)
Ga. Code Ann. Sec. 59-806 (1965)

IDAHO:
State v. Wilson, 41 Idaho 616, 627-28, 243 Pac. 359, 361 (1925) (Statute)
State v. Owen, 73 Idaho 394, 400-01, 253 P. 2d 203, 206-07 (1953) (Statute)
Idaho Code Ann. Sec. 19-2020 (9)

ILLINOIS:
Gates v. People, 14 Ill. 432 (1853) (Common law)
People v. Hobbs, 35 Ill. 2d 263, 270-275, 220 N.E. 2d 469, 473-75 (1966) cert. denied 386 U.S. 1024 (1967) (Common law)

INDIANA:
Gross v. State, 2 Ind. 329 (1850) (Common law)
Perkins v. State, 207 Ind. 119, 122, 191 N.E. 136, 137 (1934) (Common law)
Ind. Ann. Stat. Sec. 9-1504 (1956)

KANSAS:
State v. Latham, 190 Kan. 411, 431-32, 375 P. 2d 788, 803-04 (1962) cert. denied 373 U.S. 919 (1963) (Statute)
Kan. Gen. Stat. Ann. Sec. 62-1404, 1405 (1964)

KENTUCKY:
Tarrence v. Commonwealth, 265 S.W. 2d 40, 40 (1954) cert. denied 348 U.S. 899 (Common law)
Carson v. Commonwealth, 382 S.W. 2d 85, 89 (1964) cert. denied 380 U.S. 938 (1965) (Common law)

LOUISIANA:
State v. Kennedy, 8 Robinson's 590, 594-95 (1845) (Common law)
State v. Jackson, 227 La. 642, 651, 80 So. 2d 105, 107 (1955) (Statute)

MAINE:
State v. Jewell, 33 Maine 583 (1851) (Common law)

MARYLAND:
Corens v. State, 185 Md. 561, 564, 45 A. 2d 340, 343-44 (1945) (Common law)

argument is being heard at this point. At trial the petitioner did not object to the excusing for cause of any juror.

Md. Ann. Code Art. 51, 88 A. (Supp. 1967) barred disqualification of jurors by reason of beliefs against capital punishment but jurors with conscientious scruples as opposed to mere beliefs are still excused in Maryland trial courts.

MASSACHUSETTS:
Commonwealth v. Ladetto, 349 Mass. 237, 246-47, 207 N.E. 2d 536, 542 (1965) (Statute)
Mass. Gen. Law Ch. 278, Sec. 3 (1956)

MISSISSIPPI:
Spain v. State, 59 Miss. 19, 22-24 (1881) (Common law)
Phenizee v. State, 180 Miss. 746, 750-55, 178 So. 579, 580-82 (1937) (Common law)

MISSOURI:
State v. Miller, 156 Mo. 76, 84, 56 S.W. 907, 909 (1900) (Common law)
State v. Odom, 369 S.W. 2d 173, 183-84 (1963) cert. denied 375 U.S. 993 (1964) (Statute)
Mo. Rev. Stat. Sec. 546. 130 (1953)

MONTANA:
State v. Won, 76 Mont. 509, 518, 248 Pac. 201, 203-04 (1926) (Common law)
Mont. Rev. Codes Ann. Sec. 95-1909 (1968 Supp.)

NEBRASKA:
St. Louis v. State, 8 Neb. 405, 412-13, 1 N.W. 371, 373-74 (1879) (Common law)
Rhea v. State, 63 Neb. 461, 469-74, 88 N.W. 789, 790-93 (1902) (Statute)
Neb. Rev. Stat. Sec. 29-2006 (1964)

NEVADA:
Spillers v. State, 436 P. 2d 18, 21-22 (1968) (Statute)
Nev. Rev. Stat. Sec. 175.105 (9) (1959)

NEW HAMPSHIRE:
Pierce v. State, 13 N.H. 536, 556 (1843) (Common law)

NEW JERSEY:
State v. Rios, 17 N.J. 572, 591-92, 112 A. 2d 247, 256-57 (1955) (Common law)
State v. Reynolds, 43 N.J. 597, 602-03, 206 A. 2d 750, 753 (1965) (Common law)

NEW YORK:
People v. Damon, 13 Wend. 351 (1835) (Sup. Ct.) (Common law)

Petitioner did not challenge the fairness or composition of the venire or of the particular panel that finally tried the

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People v. Fernandez, 301 N.Y. 302, 93 N.E. 2d 859, 867-69 (1950), cert. denied 340 U.S. 914 (Common law)
N. Y. Code Crim. Proc. Sec. 377 (Supp. 1967)

NORTH CAROLINA:
State v. Bowman, 80 N.C. 432, 436-37 (1879) (Common law)
State v. Childs, 269 N.C. 307, 317-20, 152 S.E. 2d 453, 460-62 (1967) (Common law)

OHIO:
Blair v. State, 5 Ohio C.C. 496, 504-05 (1891) (Common law)
State v. McClellan, 12 Ohio App. 2d 204, 232 N.E. 2d 414, 416 (1967) (Statute)
Ohio Rev. Code Ann. Sec. 2945.25 (1954)

OKLAHOMA:
Smith v. State, 5 Okla. Crim. 282, 283-85, 114 Pac. 350, 351 (1911) (Statute)
Application of Sharp, — Okla. Crim. —, —, 414 P. 2d 720, 722 (1966) (Statute)
Okla. Stat. Ann. Title 22, Sec. 660 (1937)

OREGON:
State v. Leland, 190 Ore. 598, 624-25, 227 P. 2d 785, 796-97 (1951) aff'd. 343 U.S. 790 (1952) (Statute)

PENNSYLVANIA:
Commonwealth v. Lesher, 17 Serg & Rawles 155 (1827) (Common law)
Commonwealth v. Lopinson, 427 Pa. 284, 234 A. 2d 552, 560 (1967) (Common law)

SOUTH CAROLINA:
State v. James, 34 S.C. 49, 52, 12 S.E. 657, 658 (1890) (Common law)
State v. Robinson, 149 S.C. 439, 442-43, 147 S.E. 441, 442-43 (1929) (Common law)

TENNESSEE:
Cf. Long v. State, 187 Tenn. 139, 144-46, 213 S.W. 2d 37, 40 (1948)

TEXAS:
White v. State, 16 Texas 207, 218 (1856) (Common law)
Jordan v. State, 154 Tex. Crim. 217, 222, 226 S.W. 2d 449, 452 (1950) (Statute)
Texas Code Crim. Proc. Art. 35.16 (1966)

petitioner. The petitioner in fact failed to exhaust his peremptory challenges. The petitioner did not attack the

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UTAH:
State v. Condit, 101 Utah 558, 560-61, 125 P. 2d 801, 802 (1942)
Utah Code Ann. Sec. 77-30-19 (9) (12) (1953)

VERMONT:
State v. Ward, 39 Vt. 225, 231-33 (1867) (Common law)
State v. Shaw, 73 Vt. 149, 153, 50 Atl. 863, 864 (1901) (Common law)

VIRGINIA:
Clore's Case, 49 Va. (8 Gratt.) 691, 694-95 (1851) (Statute)
Hampton v. Commonwealth, 190 Va. 531, 548-49, 58 S.E. 2d 288, 294-95 (1950) cert. denied 339 U.S. 989 (Statute)
Va. Code Ann. Sec. 19.1-210 (1960)

WASHINGTON:
State v. Mahoney, 120 Wash. 633, 640, 208 Pac. 37, 40 (1922)
State v. Leuch, 198 Wash. 331, 333, 88 P. 2d 440, 441-42 (1939) (Statute)
Wash. Rev. Code Sec. 10.49.050 (1961)

WEST VIRGINIA:
State v. Greer, 22 W. Va. 800, 809 (1883) (Common law)

WISCONSIN:
Spick v. State, 140 Wis. 104, 110-11, 121 N.W. 664, 667 (1909) (Common law)

WYOMING:
State v. Aragon, 41 Wyo. 308, 316-17, 285 Pac. 803, 806 (1930) (Statute)
Wyo. Stat. Ann. Sec. 7-224 (1957)
See 48 ALR. 2d 560

CONTRA:

IOWA:
State v. Lee, 91 Iowa 499, 502-03, 60 N.W. 119 (1894) (Decision based solely on omission of challenge for scruples from statute listing specific grounds for challenge in criminal cases.)

SOUTH DAKOTA:
State v. Carrington, 11 S.D. 178, 76 N.W. 326 (1898) But see: S.D. Code Sec. 34. 3618 (Supp. 1960)

fairness of the jury on appeal, nor in his previous collateral proceedings nor in his previous petition for Certiorari. The first attack on the jury was made almost six years after the entry of judgment after all else had failed.[2] See Frazier v. United States, 335 U.S. 497, 503 (1948); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 362-64 (1963).

B. The Excusing of Jurors with Conscientious Scruples Against Inflicting the Death Penalty is Not Without Rational Foundation.

The existence of conscientious or religious scruples against inflicting the death penalty is a sufficient basis for excluding a juror unless one completely ignores the common meaning of the phrase conscientious or religious scruples. Almost every precedent discussing the disqualification for cause speaks in terms of "conscientious scruples."[3] When a man says he has conscientious or re-

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2. The petitioner requested that the jury not decide the issue of penalty but this motion was based on the mistaken theory that evidence in mitigation could not be heard by the jury. The motion had nothing to do with qualifying the jury for the death penalty. The motion has been the subject of previous discussion only in connection with his contention that the fixing of penalty by the jury was *per se*, unconstitutional. (Petitioner Brief in the Supreme Court of Illinois, No. 39387, p. 41; Petitioner's Petition for Certiorari, 379 U.S. 950, p. 24.)

3. Logan v. United States, 144 U.S. 263, 298 (1892)
Young v. State, 38 Ariz. 298, 301-05, 299 Pac. 682, 684-85 (1931)
People v. Miller, 245 Cal. App. 2d 112, 138, 53 Cal. Rptr. 720, 736-37 (1966) cert. granted on other grounds (12/4/67)
Sims v. State, 184 So. 2d 217, 218-20 (Ct. App. Fla. 1966)
Massey v. State, 222 Ga. 143, 150-51, 149 S.E. 2d 118, 123-24 (1966) cert. denied 385 U.S. 36 (1966)
People v. Crump, 5 Ill. 2d 251, 264, 125 N.E. 2d 615, 622 (1955)
Commonwealth v. Lopinson, 427 Pa. 284, 234 A. 2d 552, 560 (1967)
Black v. State, 46 Tex. Crim. 590, 593-94, 81 S.W. 302, 303 (1904)
Hampton v. Commonwealth, 190 Va. 531, 548-49, 58 S.E. 2d 288, 294-95 (1950) cert. denied 339 U.S. 989

ligious scruples against a certain act, he normally means that he will not perform the act under any circumstances. The very notion of a conscientious scruple is one which implies transcendancy over the demands of law and society. See White v. State, 16 Texas 207, 218 (1856). In State v. Favorito, 115 N.J. L. 197, 199-201; 178 Atl. 765, 766-67 (1935) it was held that a juror need not be asked if his scruples will influence his verdict.

For the first time in any court the petitioner argues that the trial court was not strict enough in allowing challenges for cause. This issue was not raised in any prior proceeding. It was not raised in the instant proceeding either in the petition in the Circuit Court of Cook County, in the Brief before the Illinois Supreme Court or the Petition For Certiorari granted by this Court. More importantly there was no objection at trial to the form of the qualifying questions put to the jurors or to the trial court's action in excusing for cause. If defense counsel felt that a proper basis for challenge for cause was not made, they could have asked questions to clarify the status of any juror. They chose not to do so. Frankly, their failure to object indicates not so much a waiver as an understanding that when a man says he has conscientious scruples against doing something he would be unwilling to do it under any circumstances.

Furthermore, in the context of this voir dire it is clear that the veniremen were cognizant of the import of the question. In Illinois, as in most jurisdictions, the entire venire is present in the courtroom while the individual jurors are questioned. The venire is brought into the courtroom and given preliminary instructions concerning the nature of the case and the trial procedure. The veniremen are then sworn as a group. In this case three

venires were called into the courtroom. (R. 633, 731, 843). It is impossible to tell exactly when each new venire came into the courtroom but it is clear that virtually every juror heard the questioning of several previous jurors. The Court specifically instructed veniremen to listen to the examination of other jurors. (R. 636, 851).

The first venire heard the first prospective juror, Mr. Salazar, ask for clarification of the question concerning conscientious scruples. He was asked if he would sign a death verdict if he believed it was a proper case. He replied, "No."

> "THE COURT: In other words, you don't believe that you would vote to inflict the death penalty in any case?
>
> A. No.
>
> Q. In other words, what counsel is getting at is this: If you have a conscientious or religious scruple against the infliction of the death penalty, say so to the gentleman.
>
> A. Yes, sir." (R. 640-644; Petr's. App. 1-2)

After this colloquy no prospective juror could have been in doubt as to what was meant by conscientious or religious scruples against inflicting the death penalty. See Commonwealth v. Gelfi, 282 Pa. 434, 436-38, 128 Atl. 77, 78-79 (1925). At several points throughout the voir dire different veniremen were asked if, after all the evidence was in, they and their fellow jurors were convinced that petitioner was guilty and that the case was a proper one for the death penalty, they would sign a death verdict. (R. 649, 650-51, 655, 659, 663-64; 681; 710, 719-20, 723, 23-A; 728, 738; 751, 757-58, 770, 776-77, 783, 787, 795, 817-18, 823-23A, 828, 841, 856, 864, 902-03, 911; 976, 920, 936, 941; 982; 989-90; 998, 1005, 1016; 1025.) In addition to Mr. Salazar, on five occasions the trial court made it clear

that it was concerned only with persons who would not render the death penalty under any circumstances. (R. 644, 684-85, 715, 944, 991) (Pets's. App. 2, 8, 10, 38, 41).

Petitioner implies that three jurors were excused merely because of opposition to the death penalty.[4] The record reveals that the first of these jurors, during examination by defense counsel, volunteered the statement, "I do not believe in capital punishment" and after questioning by the court testing his belief he further volunteered, "This is my conscientious objection" after which he was excused. (R. 685-86) (Pet. App. 8-9). The second juror stated "I

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4. Petitioner argues that Illinois law allows a venireman to be excused merely for opposition to the death penalty. The point is abstract in this case since no juror was excused because of mere or philosophical opposition to the death penalty. (And to the extent of our knowledge, no venireman has been so excused in a capital case in Illinois nor has any venireman in a capital case been asked merely if he was opposed to capital punishment.) The challenge for cause based on conscientious scruples against inflicting the death penalty arose at common law in Illinois. Gates v. People, 14 Ill. 433 (1853). A statute was enacted to codify and not to extend the law and the standard remained one of conscientious or religious scruples against inflicting the death penalty. People v. Winchester, 352 Ill. 237, 243, 185 N.E. 580, 582 (1933); People v. Crump, 5 Ill. 2d 251, 264, 125 N.E. 2d 615, 622 (1955); People v. Bernette, 30 Ill. 2d 359, 197 N.E. 2d 436 (1964). The challenge for cause continued even when the statute was repealed in favor of a provision not specifying particular grounds for challenge. People v. Hobbs, 35 Ill. 2d 263, 270-75; 220 N.E. 2d 469, 473-75. It should also be noted that other courts with statutes similar to Illinois, along with the ordinary run of men usually understand the statutory use of "conscientious scruples" to mean more than mere beliefs which have no effect on the juror's verdict. O'Rear v. State, 188 Ala. 71, 74, 66 So. 81, 82 (1914); Black v. State, 46 Tex. Crim. 590, 593-94, 81 S.W. 302, 303 (1904); Thompson v. State, 19 Tex. Crim. 598, 618 (1885). The challenge for cause based upon conscientious scruples is a creature of courts not of statutes. The statutes of the various states are usually declaratory of the common law of the state. To the extent that Petitioner's Appendix 2 indicates that the challenge is essentially statutory, it is misleading.

think my conscience would bother me" and indicated his disagreement with the law of the State, (R. 857, Pet. App. 29). The third juror indicated first that she did have conscientious scruples and then said she did not. The trial court insisted that the juror step into the box. After an interval the juror indicated that she would not accept the responsibility for deciding to put somebody to death and alluded to "my conscience." (R. 929, 932-33; Pet. App. 36). Certainly in each of these three cases the trial court's action was justified. The first juror did not even answer a question before insisting on his conscientious objections. The second and third jurors indicated that their beliefs would affect their verdicts. See United States v. Puff, 211 F. 2d at 186. Indeed the reaction of the court toward the third juror indicated the court's reluctance to excuse a juror merely because of opposition to or reluctance about the death penalty.

In Turberville v. United States, 303 F. 2d 411 (D.C. Cir. 1962), cert. denied 370 U.S. 946, the trial court excused jurors who stated merely that they were opposed to capital punishment. The court noted that, as in the present case, no objection was made at trial. The concurring judge specifically noted that if an objection had been made the government would have the opportunity to clarify the record, 303 F. 2d at 422. The Court affirmed the judgment in the face of an argument similar to the one made here. In the exercise of its supervisory power it did suggest that further questioning be conducted in future trials. However, the court's language in discussing the nature of the challenge is very significant.

> "The touchstone in excuse for cause under the doctrine adopted by most courts is a conscientious scruple. This means something more than mere opposition. It

> means an opposition of such nature as to impede ability to render a fair and impartial verdict upon the law and the evidence as it develops in a given case." p. 420

Thus the court in Turberville also recognized the common meaning of a conscientious scruple.

There is a further point to be made with respect to the disqualification of a juror with conscientious scruples. In United States v. Cornell, 25 Fed. Cas. 650, 655-56, Mr. Justice Story suggested that to put a man with a conscientious scruple upon a jury would be to force the juror to violate either his conscience or his oath. And a juror who would violate either is not a fit juror. And it is not without significance that the statutes of Arizona, California, Montana, Minnesota, New York, North Dakota, Oklahoma, Utah and Washington all include the phrase that such a juror shall neither be "permitted nor compelled" to serve on a jury in a capital case. (See Petr's App. 48, 49, 50, 51, 54, 55). Perhaps we are asserting a *jus tertii* but it seems that a trial judge who refuses to put a man to the test of his scruples against his oath should not be reversed because of it.

Petitioner asks what "if the shoe were on the other foot" and persons favoring capital punishment were excluded from the jury. (Petr's Br. p. 24). We note that nearly every federal and state court considering the question has held that the defendant is entitled to challenge for cause any venireman with a bias favoring capital punishment.[5]

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5. UNITED STATES:
Stroud v. United States, 251 U.S. 380, 381 (1920)
See United States v. Puff, 211 F. 2d 171, 182 (2nd Cir. 1954)
CALIFORNIA:
People v. Tanner, 2 Cal. 257, 260 (1852)
People v. Hughes, 57 Cal. 2d 89, 94-95, 367 P. 2d 33, 36 (1961)

Petitioner, in fact, suggests that the ultimate test of the sufficiency of the basis for a challenge for cause when he asks, what "if the shoe were on the other foot". We accept the test and we do not think petitioner would fare very well under the "shoe on the other foot" test. If, as petitioner suggests, persons with conscientious scruples against the death penalty were included on a jury and if the jury were, as petitioner suggests they might, to return a death verdict, what would petitioner have to say about perjury or deliberate deception during voir dire by certain jurors? We have no doubt that petitioner would engage in a course of litigation to rival this case in his attempt to overturn such a verdict.[6] Similarly if a juror were to state that he had "a conscientious or religious scruple" against the defense of insanity, would not the defense rightfully claim

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People v. Pike, 58 Cal. 2d 70, 87, 372 P. 2d 656, 665 (1962) cert. denied 371 U.S. 941

DISTRICT OF COLUMBIA:

Funk v. United States, 16 App. D.C. 478, 487 (1900) cert. denied 179 U.S. 683

Turberville v. United States, 303 F. 2d 411, 421 (D.C. Cir. 1962)

ILLINOIS:

See People v. Hobbs, 35 Ill. 2d 263, 272, 220 N.E. 2d 469, 473-74 (1966)

INDIANA:

Gross v. State, 2 Ind. 329, 330 (1850)

LOUISIANA:

State v. Henry, 196 La. 217, 236, 198 So. 910, 915 (1940)

OHIO:

State v. McClellan, 12 Ohio App. 2d 204, 232 N.E. 2d 414, 416 (1967)

6. It is not without significance that Faye Goldberg, in her study reprinted in petitioner's brief, refers to those having conscientious scruples against the use of the death penalty and yet still vote for it as guilty of "marked inconsistency" (Petr's App. p. 68).

a challenge for cause? See Territory v. Lum Dim, 23 Haw. 792, 795-96 (1917); Jones v. State, 60 Tex. Crim. 139, 142, 131 S.W. 572, 573 (1910). If a juror claimed that because of religious or moral beliefs he would be very reluctant to sanction the taking of human life would not a defendant claiming self-defense be entitled to a challenge for cause? See Webb v. Commonwealth, 314 S.W. 2d 543, 545 (Ky. 1958); People v. Bennett, 79 Cal. App. 76, 89-93, 249 Pac. 20, 25-26 (1926); Cf. Smith v. Smith, 7 Cal. App. 2d 271, 273-274, 46 P. 2d 232, 233 (1935) (religious scruples concerning divorce). The simple fact is that a man's conscientious scruples will, in almost all cases, affect his judgment and preclude his acting contrary to their dictates. The exclusion of such jurors from cases in which their scruples will be called into question cannot be said to be without rational foundation.

C. The Jury That Tried Petitioner Was Not Improperly Constituted.

The jury that tried petitioner was a representative jury indiscriminately chosen from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions. Hoyt v. Florida, 368 U.S. 57, 59, (1961). The jury was selected at random from the legal voters of the towns and precincts of the county. Ill. Rev. Stat. 1959, Ch. 78, Sec. 25. It is, of course the burden of petitioner to show that his right to a representative jury has been violated. Swain v. Alabama, 380 U.S. 202, 226 (1965).

To meet this burden, petitioner cites certain public opinion polls showing large numbers of persons opposing the death penalty and their relative distribution among racial, religious, educational and economic groups. The polls are subject to numerous technical objections. They do not deal

specifically with Illinois. They are not confined to persons eligible to serve as jurors, they do not deal in terms of conscientious scruples, and they are contradicted somewhat by the poll of jurors in Crosson, An Investigation Into Certain Personality Variables Among Capital Trial Jurors (1966)[7] who found that 73% favored and 27% rejected capital punishment (Crosson, p. 45).

1. *Persons with conscientious scruples against the death penalty do not constitute a definite class within the meaning of the cases prohibiting the systematic exclusion of a class of citizens from jury duty.*

The petitioner's argument is totally without support in the applicable precedents. The cases dealing with the jury-exclusion problem deal solely with exclusion of definite classes on arbitrary grounds. Thus it is arbitrary to exclude jurors on the basis of race, Smith v. Texas, 311 U.S. 128 (1940), ancestry or ethnic affiliations, Hernandez v. Texas, 347 U.S. 475 (1954); or religion, Schowgurow v. State, 240 Md. 121, 213 A. 2d 475 (1965); Jaurez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925). For that matter, it is irrational deliberately to include members of a particular race in a jury panel. Collins v. Walker, 335 F. 2d 417 (5th Cir. 1964) cert. denied 379 U.S. 901 (1964). The jury exclusion cases are concerned therefore primarily with what have been the classic categories of equal protection law: race, religion, and economic status. Petitioner makes no claim, nor could he, that jurors in Illinois are accepted or rejected for political, religious, racial or economic reasons.

Those with conscientious scruples against the death penalty do not constitute the same kind of class with which the

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7. Cited as authority by petitioner in his Petition for Certiorari and by petitioner Bumper in No. 1016.

jury exclusion cases are concerned. Those with scruples against the death penalty are found in every political party, among men and women of all races, all occupations, all ages and all educational backgrounds. They are not an identifiable group and, beyond their views on the death penalty, have no common group interests. In Gorin v. United States, 313 F. 2d 641, 643-44 (1st Cir. 1963) cert. denied 374 U.S. 829 the defendant claimed he was prejudiced by the exclusion of unregistered voters from his jury. The Court properly held that unregistered voters include many sorts of persons without a true common denominator, that they were not the kind of defined group contemplated by the jury exclusion cases. To apply the doctrines developed in the long line of jury-exclusion precedents to this case is to distort them beyond their meaning and cheapen their currency in American life.

The petitioner seeks to elevate the death penalty disqualification into the category of the jury exclusion cases by pointing out that the polls prove the disqualification operates unequally on racial, religious and economic groups. The polls are not consistent on all of these points. Opposition varies with respect to community size but there is no direct correlation; so too with income where opposition varies but not in direct proportion to salary. Religion does not seem to have much effect. Politics shows opposition at the rates of 40% among Republicans, 51% among Democrats and 48% among Independents.

Aside from the fact that these percentages differences are not overwhelming it is not contended by petitioner, and it could not be, that the Illinois practice was deliberately designed to exclude any race, sex, economic or political group. In Hoyt v. Florida, 368 U.S. 57 (1961) this Court was faced with a provision which excluded women

from jury service unless they volunteered. Of course, the practical effect was the virtual absence of women from juries. The Court held that a reasonable policy justified the statute. Significantly a separate concurrence was based on the fact that there was no deliberate effort to keep women off juries. The death penalty disqualification does not operate on any racial, religious or economic group with the extreme effect that the Florida provision had on potential women jurors and its effect is entirely non-deliberate.

There is nothing to indicate that the jury that tried Witherspoon was not representative. (See Appendix A). Of course the religion and politics of the eight men and four women does not appear of record. Salary and economic status can only be inferred from the voir dire. The race of the jurors does not appear nor does that of the petitioner. (In fact, all jurors and the petitioner were Caucasian.) But from what does appear, the jury seems representative.

2. *In any event the exclusion of persons with conscientious scruples is based upon reasonable grounds.*

This Court has never held that the States are obliged to provide a representative jury. All that can be said is that if the State provides a jury it must be a fair and impartial jury. But assuming, arguendo, that a State defendant is entitled to a representative jury and also assuming, arguendo, that those with conscientious scruples against inflicting the death penalty constitute the kind of class to which the jury exclusion opinions are directed, it is clear that the exclusion of such jurors is not arbitrary but is reasonable. And, of course, a reasonable exclusion of a distinct class is not prohibited. Hernandez v. Texas,

347 U.S. at 478. In Hoyt v. Florida, 368 U.S. 57 (1961) this Court upheld a practice which, severely limited the participation of women on the grounds that it is reasonable to exclude women on the basis that their place is in the home and that, only if a woman decides jury duty is consistent with her home life will she serve on a jury. This was despite the fact that the statute was not strictly limited to married women or women with families.

In Fay v. New York, 332 U.S. 261 (1947) jurors were excluded on the basis of conscientious scruples as to penalty, circumstantial evidence, various laws, particular defenses; because of prejudice against defendants who do not testify and because of inability to lay aside opinions acquired from the reading of newspapers. Now although several of these exclusions may not have applied to a given case heard by the juror this Court held that "Each of the grounds is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized." 332 U.S. at 270. The dissenters did not dispute the doctrines of the majority but based their dissent on the lack of standards beyond a vague intelligence standard given to the jury officials. The dissent concluded that the standard applied "is apparently of an economic or social nature." 332 U.S. at 299.

The present case presents a far stronger justification than either Hoyt or Fay. Unlike Hoyt each excluded juror declares his disqualification in open court. In Hoyt a juror determined her own qualifications and, if the juror had neither family nor pressing duties, she would be excluded without serving the announced State policy. Unlike Fay, the disqualification was based solely on the kind of case that the venireman would hear and not on the basis of the kind of case he was likely to hear. Also unlike

Fay the ground of disqualification here related solely to the issues of the case and not to matters that might not arise.

In short, the exclusion of jurors for conscientious scruples against the death penalty is a reasonable exclusion. This is implicit in the holdings of all the cases sustaining the challenge for cause, supra, pp. 8-13, and it is the explicit ruling of the Circuit Courts of Appeal in United States v. Puff, 211 F. 2d 171 (2nd Cir. 1954), cert. denied 347 U.S. 963 and Pope v. United States, 372 F. 2d 710 (8th Cir. 1967).

3. *The use of public opinion polls to establish or deny legal rights is improper.*

A more important question is the role of public opinion surveys in setting policy. Russell Baker has facetiously suggested that we replace presidential primaries and perhaps even elections with news surveys.[8] Now the results of polls it is suggested should govern judicial decision. We submit that the only true representatives of the community are their elected representatives who this last session defeated a death penalty moratorium bill by a vote of 98 to 68.[9] If opinion polls are to be a substantial factor then legal procedure will change and must change as the polls change. If there is a large uprising of popular sentiment for the death penalty then the death penalty qualified jury is proper. If the reverse is true then the qualified jury is improper. All the trial judge needs to do each day is consult the "Official Court Pollster" and see if the level

9. Illinois Journal of the House of Representatives, May 17, 1967, pp. 33-34 (H.B. 157). In the last decade some form of abolition bill has been presented at each legislative session and each failed of passage.

8. New York Times, March 7, 1968, p. 42.

of opposition to any given law has passed a certain percentage point set by the proper higher Courts.

As a subsidiary issue the Petitioner argues that the procedure allowing the prosecution to elect whether to qualify the jury is a denial of equal protection of the laws. This argument made by petitioner was not presented to the courts below, nor is it to be found in the Petition for Certiorari. In any event the argument is without merit. There is no showing that the conduct of the prosecution in this case arbitrarily put petitioner before a death qualified jury. The murder of a uniformed police officer acting in the line of duty is hardly a poor case for the imposition of the death penalty. The facts of the case pertaining to the petitioner's motive and flippant attitude toward his victim justified the imposition of the penalty. The prosecution, consonant with its duties, made a bona fide effort to obtain the death penalty and the jury returned such a verdict. The record shows no arbitrary exercise of discretion on the part of the prosecution and there is no reason to suppose that the courts of Illinois would allow such to be exercised.

In any event, the fact remains that a death qualified jury is a representative jury and the election of a prosecutor to seek such a penalty does not deprive petitioner of representative jury.

D. The Jury That Tried Petitioner Was Fair and Impartial.

The petitioner contends that the jury that tried him was not fair and impartial. This contention must be viewed in light of the fact that petitioner never claimed and does not now claim that his conviction was not based

on sufficient evidence or was unwarranted. See Fay v. New York, 332 U.S. 261, 265 (1947).

The petitioner, of course, has the burden of showing that the jury that tried him was unfair. Beck v. Washington, 369 U.S. 541, 558 (1962). None of the jurors who finally tried petitioner were challenged for cause by petitioner, nor did petitioner exhaust his peremptory challenges. "It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case." Fay v. New York, 332 U.S. at 282.

1. *The studies offered by petitioner are inconclusive, contradictory and do not purport to measure the fairness or impartiality of jurors.*

To meet his burden petitioner offers the results of certain questionnaires and psychological surveys. Two of these, the Goldberg and Wilson studies, used questionnaires distributed to college students. Goldberg used 200 students and Wilson used 187 students. The results of their studies are not persuasive. The sampling is incredibly small involving less than four hundred students. Indeed another writer, cited by petitioner in his petition for certiorari but dropped from his brief, states "It is doubtful that undergraduates can be representative of the more heterogeneous "twelve good men and true actually serving on juries." Crosson, An Investigation Into Certain Personality Variables Among Capital Trial Jurors (1966).

Neither the Goldberg nor the Wilson studies tested what actually is the function of a juryman in a criminal case, that is, the judgment of credibility of witnesses. The

studies were based on printed summaries of facts of cases. There was no attempt to gauge the reaction of students to actual testimony or even to transcript of testimony. In addition none of the students were instructed, as real jurors would have been, concerning the elements of offenses, the presumption of innocence and the burden of proof beyond a reasonable doubt.

A further glaring error in the studies is their failure to test the effect of collective judgments and the dynamics of jury deliberation, on individual jurors. A verdict is the result of collective judgment processes in which the individual jurors consult, debate, exchange viewpoints, change judgments and opinions in order to reach their verdict, and a test designed to show how an individual reacts to a case without the benefit of group discussion is deficient.

The results of the Goldberg and Wilson studies show only that there is a slightly higher tendency for death qualified jurors to say guilty in response to a narrative about the facts of a case. The percentages are not high. In the Goldberg study, which was the more extensive involving more students and many more fact situations, the qualified jurors reached a guilty verdict in 75% of the cases while the unqualified jurors reached guilty verdicts in 69%. In murder cases the rate was 48% to 41%. In Fay v. New York, 332 U.S. 261, the data, though old, showed a difference of 83% to 43% in convictions in 1933 and a difference of 82% to 37% in 1934 between special jurors who were qualified and regular jurors who were not. The Court said, "No defendant has a right to escape an existing mechanism of trial merely on the ground that some other could be devised which would give him a better chance of acquittal." 332 U.S. at 285. See Moore v. New York, 333 U.S. 565 (1948)

The fundamental defect of the Wilson and Goldberg studies on which petitioner relies is their total lack of relation to the legal standard of impartiality. The findings of the studies are only relative. Just as was true of the statistics in Fay one cannot tell whether the studies reflect "a too great readiness to convict on the part of special juries or a too great readiness to acquit on the part of ordinary juries." 332 U.S. at 280. The same point is implicit in Justice Schaefer's opinion below when he notes that while petitioner attacks death qualified jurors as prosecution prone and therefore not impartial, "the same study indicates that jurors with scruples against the death penalty could be characterized as 'defense prone'." People v. Witherspoon, 36 Ill. 2d 471, 476, 224 N.E. 2d 259, 262 (1967). The studies were conducted without regard for the legal standard of impartiality and prove nothing with regard to that issue. These same materials were before the Eighth Circuit Court of Appeals when the challenge to a death qualified jury was rejected by the Court sitting en banc in Pope v. United States, 372 F. 2d 710, 724-25 (1967).

Petitioner also cites an article by Oberer.[10] Oberer is not a psycholigist and cites no evidence to support his conclusions. He can hardly be considered objective since he describes death scrupled jurors as "the most humane" and death qualified jurors as "those least in touch with . . . the dedication to human charity and understanding." 39 Tex. L. Rev. at 557. Such language is understandable coming from counsel for petitioner but not from one who

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10. "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt," 39 Texas L. Rev. 545 (1961).

claims to be objective.[11] Oberer relies principally on the concept of the authoritarian personality. His reliance is misplaced. Even Crosson, whose work is plainly designed to provide support for Oberer, states that "Research since the publication of The Authoritarian Personality tends to dispute the unitary quality and consistency of the authoritarian personality envisioned by the [authors upon whom Oberer relies]" Crosson, p. 67.

Crosson's study rather supports the notion that there is no proof that death qualified jurors are biased and partial. This is an interesting result since Crosson clearly set out to support Oberer and other lawyers opposed to death penalty qualification. Crosson, p. 80, 51, pp. 5-10. Crosson, too, refers to his death scrupled jurors as "humanitarian", Crosson, p. 69. Despite his obvious bias Crosson's findings do not support petitioner's position. Crosson's method was to administer the same psychological tests to 36 persons who served as jurors in capital trials and to 36 persons who did not believe in the death penalty but who had served as jurors. The tests were designed to elicit degrees of dogmatism, opinionation, conservatism-liberalism, critical thinking and manifest hostility. These factors are all supposedly related to determining the authoritarian personality. Yet in only one category did death qualified jurors reach a significant level of differentiation, that is they were significantly more conservative. Nowhere does Crosson define what he

11. It could as well be argued logically that the death scrupled juror may be one whose humaneness is very circumscribed and applies only to the people he sees about him. The fate of the storekeeper, the policeman and the man in the street, whose lives the death penalty is designed to protect but whose names and faces he does not know, do not concern him. He is insensitive to the needs and welfare of the millions of individuals who live in his society.

means by conservative but he obviously does not think highly of that condition. On three of the other variables dogmatism, critical thinking and manifest hostility the differences do not reach the limit of statistical significance set by Crosson himself. On the fifth variable it was the unqualified jurors who showed higher levels of opinionation that qualified jurors. Crosson, pp. 59-60. Crosson did not very much like his results. Whenever the literature did not seem to support his thesis, he rejected the professional critiques by citing the opinions of at[illegible]neys, p. 67. Crosson tried to explain the unexpected findings on opinionation by arguing that women are more opinionated than men and they dominated the death scruples group. The author then relied on his "impression" that women seemed to be put on capital juries as often as men and concludes that the women serving on such juries will probably be opinionated conservatives; a rather neat way to turn bad facts to your advantage. The failure of Crosson's study to support the petitioner's thesis is, we submit, especially significant in light of the author's clear bias for petitioner's argument.

The petitioner's argument is based, in substantial part, on the claim that persons without conscientious scruples against the death penalty are "authoritarians". This psychological term of art is grossly misused in this context.

"The Authoritarian Personality" by Adorno, et al., was published in 1950. It began as a study of anti-semitism and mushroomed into an analysis of certain personality characteristics discernible among that group of persons who may be loosely described as "authoritarians". In 1954 a critique and reassessment of the original work was published to which some of the original authors con-

tributed. See Christe and Jahoda "Studies in the Scope and Method of 'The Authoritarian Personality'."

These writers concluded that the authoritarian personality is distinguished by anti-semitism, ethnocentrism and political-economic conservatism. He is rigid in his beliefs (although no evidence for this is presented), he makes frequent use of stereotypes in his political perceptions and judgments, he is sympathetic with the use of violence against his enemies, he distinguishes sharply between his "ingroup" and the "outgroups" which he interprets as menacing his security. More concretely he shares the most commonplace of the vulgar cliches about Jews, foreigners, reformers, homosexuals, intellectuals, and he admires strong men, business men, successful men, manly types who have no tender side or who allow it no play in their lives. (Christe and Jahoda, p. 29)

Petitioner contends that he was tried by a jury made up of "authoritarians" who would have scored high on Adorno's California (or Berkeley) F Scale, the testing device used to measure authoritarian attitudes, while the jurors excluded because of scruples are true humanitarians who would have been the ideal low scorers on the F Scale. In making this argument counsel ignore their own authorities, for the psychologists quite specifically point out that opposition to cruelty and aggressiveness (i.e. scruples against capital punishment) in and of itself means nothing. The most common single symptom characteristic of low scoring men and women on the F Scale was neurotic depression with feelings of inadequacy (manic depressive). (P. 158) In spite of these findings, petitioner would impanel low "F" scorers due to their lack of "extrapunitiveness" regardless of the fact that this may be merely a part of a larger personality pattern which would be

undesirable in any juror. For example, take the juror with conscientious scruples and add the following characteristics which were common among the low scorers interviewed:

1. Signs of inferiority feelings, easily hurt, unhappy, self-critical, fatalistic;
2. Submissive reactions in social situations;
3. Lack of energy and work inhibition.

Result: An anxious ruminator of the obsessive-compulsive type (potential suicide). (P. 160)

The point of all this is not that there is something wrong with people who oppose capital punishment but that you cannot generalize about them, or about people who have no conscientious scruples, as the defense does, without conducting a thorough battery of psychological tests.

By the same token neither can you say that not being against capital punishment is the same as being in favor of it (a postulate the petitioner has never attempted to substantiate), and then move on to the generalization that all persons favoring capital punishment are "authoritarians."

The authors themselves would conclude that "authoritarians" may be found all along the political spectrum and that the simple absence of conscientious scruples against capital punishment is not evidence of "authoritarianism." The authors cited by the petitioner are only willing to designate a person as "authoritarian" after the most exhaustive tests specifically designed to measure attitudes, while the defense leaps to this conclusion almost willy-nilly.

If anything, the petitioner makes a case for revamping the jury system so as to provide for complete

psychological evaluation of all prospective jurors before the voir dire examination.

This Court is not the first to deal with this issue. In State v. Leland, 190 Ore. 598, 624-25, 227 P. 2d 785 (1951) aff'd. 343 U.S. 790 (1952) the defendant argued that qualified jurors will be more harsh and vindicative in the enforcement of laws and the punishment of crime. The court rejected the charge as an indictment of the People of Oregon, since it was by their will that capital punishment was authorized in Oregon, and held that one can be impartial even if he has no scruples against the death penalty. See Clarke v. Grimes, 223 Ga. 461, 156 S.E. 2d 91 (1967). In People v. Nicolaus, 65 Cal. 2d 866, 882, 423 P. 2d 787, 798 (1967) the defendant recognized the very substantial California precedents upholding the challenge for cause but asked for an overruling decision. The Court said, "Defendant contends that these cases should be overruled, complaining, in effect, that a death qualified jury does not constitute a jury of one's peers; that it cannot answer guilt —innocence questions as favorably to the defendant; that it cannot be impartial on the matter of punishment in the event of conviction; that it does not take into the jury room a pattern of attitudes characteristic of the community at large; that such a jury is authoritarian in nature and not disposed to humanitarianism. Such contentions are untenable, not only for the reasons stated in the foregoing cases, but specifically, were even one jury committed to a policy opposed to imposition of the death penalty in a proper case the rendition of justice in murder cases, as presently defined in our statutes on the subject, could be nullified." The court concluded with the obvious observation that such fundamental change rests in the legislative domain.

In Turberville v. United States, 303 F. 2d 411, 420 (1962) the Court considered the issue of impartiality and held that there was no proof that "persons not opposed to capital punishment are so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case." Nor is there proof today that lack of opposition to the death penalty destroys a man's capacity to weigh evidence impartially. One would rather suspect that a man who had conscientious scruples, who probably will act in opposition to the dictates of law, is far more likely to lack the objectivity required of a fair juror.

The papers and studies upon which petitioner relies contradict each other. They are all based on small samples and Crosson doubts the validity of the Wilson and Goldberg subject groups. The jury differentials shown in the more extensive Goldberg study are relatively small and the Crosson data does not support petitioner's conclusions. The best petitioner could possibly do is show, and he has not so shown, that a jury not qualified to give the death penalty will convict somewhat less often that a qualified jury. In Fay the Court noted that "a system of exclusions could be so manipulated as to call a jury before which defendants would have so "little chance" of a decision on the evidence that it would constitute a denial of due process . . ." The studies offered by petitioner do not show that defendants have too "little chance" for a decision on the evidence. The petitioner's claim is nothing more than an argument, already rejected, that his trial procedure was improper merely because "some other could be devised which would give him a better chance of acquittal." Fay v. New York, 332 U.S. at 285.

The defendant clearly has not shown that the jury that tried him was not fair and impartial. Each of the jurors

who tried him testified at voir dire under examination by counsel for both parties that they could be fair and impartial. (Appendix A) Several of the jurors were first examined by defense counsel and tendered by defense counsel to the prosecution. This is hardly a "handpicked" jury. No limit was placed on the efforts of defense counsel to uncover bias or partiality. Many of the jurors were examined to the satisfaction of petitioner's counsel on issues such as presumption of innocence, the burden of proof beyond a reasonable doubt, the credibility of police officers, the fact of a prior conviction and their ability to return a verdict of not guilty. (Appendix A) None of these jurors were challenged for cause and petitioner did not exhaust his peremptory challenges. The sworn assertions of fairness must be accepted. "One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain manner." Dennis v. United States, 339 U.S. 162, 170 (1950). If this was true in the far more aggravated facts of Dennis where government employees who could be discharged from their employment because of disloyal acts sat in judgment on a self-admitted Communist being tried for contempt of Congress in a time of high anti-communist sentiment, then it is indisputable in the instant case where all that is said to influence the jurors are some vague psychological tendencies whose existence is far from proven.

The petitioner claims also that the jury was not impartial on the issue of penalty. This issue was not raised in the proceedings below. It was not raised in the Petition For Certiorari. It is manifestly beyond the scope of

the Question Presented. The respondent therefore will not reply to this Argument unless directed to do so by the Court.

2. *The State has a valid interest in adopting a procedure whereby the jury decides the issue of guilt and punishment in a single trial and the vesting of discretion as to punishment in the jury does not obviate the need to exclude jurors with conscientious scruples against the death penalty.*

The petitioner advances an argument that the challenge for cause is unnecessary because the jury can reach a verdict of guilty without inflicting the death penalty, that the vesting of discretion in the jury as to penalty obviated the need for any qualification of jurors on the question of penalty. In State v. Reynolds, 43 N.J. 597, 602-03, 206 A. 2d 750, 753 (1965) the Court pointed out that the discretion vested by the Legislature in the jury was a discretion to be exercised on the basis of the evidence before it, not on the basis of pre-trial principles. In People v. Riser, 47 Cal. 2d 566, 575, 305 P. 2d 1, 7, (1956) it was said that the statute "calls for the exercise of legal discretion, not for the unswerving application of views formulated before trial that will compel a certain result no matter what the trial may reveal. There must be a meaningful choice . . . fundamentally based on the evidence and made during and not before deliberation on the verdict." Again nearly every court considering the question has made similar rulings.[12]

12.

ARIZONA:

Leigh v. Territory, 10 Ariz. 129, 138, 85 Pac. 948, 951-52 (1906)

The petitioner suggests that this Court should obviate the necessity of qualified jurors by requiring the States to adopt either judicial sentencing or bifurcated trial procedures. Of course the petitioner is asking this Court to become "a rule making organ for the promulgation of state rules of criminal procedure," which it is not. Spencer v. Texas, 385 U.S. 554, 564 (1967).

The Illinois procedure attacked by petitioner is a reasonable one which a state legislature could well decide

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ARKANSAS:
Needham v. State, 215 Ark. 935, 938-39, 224 S.W. 2d 785, 787 (1949)

FLORIDA:
Piccott v. State, 116 So. 2d 626, 628 (Sup. Ct. Fla. 1959)

IDAHO:
State v. Wilson, 41 Idaho 616, 243 Pac. 359 (1925)

INDIANA:
Gross v. State, 2 Ind. 329, 331 (1850)

KENTUCKY:
Jones v. Commonwealth, 14 Ky. L.J. 223, 19 S.W. 844 (1892)

LOUISIANA:
State v. Melvin, 11 La. Ann. 535 (1856)

MASSACHUSETTS:
Commonwealth v. Ladetto, 349 Mass. 237, 246, 207 N.E. 2d 536, 542 (1965)

MISSOURI:
State v. Wooley, 215 Mo. 620, 115 S.W. 417, (1908)

NEBRASKA:
Haddix v. State, 76 Neb. 369, 107 N.W. 781 (1906)

OKLAHOMA:
Hopkins v. State, 9 Okla. Crim. 104, 109-11, 130 Pac. 1101, 1103-04 (1913)

OREGON:
State v. Leland, 190 Ore. 598, 625, 227 P. 2d 785, 797 (1951)

TEXAS:
Caldwell v. State, 41 Texas 86, 93 (1874)

WEST VIRGINIA:
State v. Greer, 22 W.Va. 800, 809 (1833)

WYOMING:
State v. Aragon, 41 Wyo. 308 317, 285 Pac. 803, 806 (1930)

was fairer to defendants in capital cases than other procedures.

The petitioner cites the example of the bifurcated trial used most commonly in California. In California the bifurcated trial consists of a guilt and a penalty phase heard by the same jury. It is not commonly understood that two juries are not impanelled. See People v. Smith, 63 Cal. 2d 779, 789, 409 P. 2d 222, 229 (1966). Further, the bifurcated trial procedure, which allows a full scope of evidence in aggravation, has resulted in a far more frequent infliction of the death penalty than occurred under the older procedures. Indeed in this respect petitioner is far better off under the Illinois procedure where he has, in effect, the right to introduce evidence in mitigation. (People v. Crump, 5 Ill. 2d 251, 258, 125 N.E. 2d 615, 619 (1955); People v. Mangano, 375 Ill. 72, 77, 30 N.E. 2d 428, 430 [1940]) while the State cannot introduce evidence which is relevant only in aggravation. (This was admitted by petitioner in his brief before the Illinois Supreme Court on direct appeal Defendant's Br., No. 36277, p. 25).

Even if a two-jury system or judicial sentencing were adopted the jurors would still, to a large extent, have to be qualified for the death penalty. A juror with conscientious scruples against inflicting the death penalty could not, consistent with his scruples, sign a verdict of guilty knowing that, on the basis of that verdict, a judge or another jury might send a man to his death. See United States v. Wilson, 28 Fed. Cas. 699, 701, No. 16, 730 (C.C. Penn. 1830); Pierce v. State, 13 N.H. 536, 556 (1843). In People v. Ray, 252 A.C.A. 1002, 61 Cal. Rep. 1, 13 (1967) the Court noted that "the exclusion is warranted because the state of mind evidenced by conscientious objection to the death penalty does in fact pervade the trial

on the issue of guilt whenever that penalty may be imposed. So long as it is known that the offense may be so punished, this influence may be felt even though another jury or the court were to determine the actual sentence." The Indiana Supreme Court echoed the same point in Perkins v. State, 207 Ind. 119, 122, 191 N.E. 136, 137 (1934) where it was the duty of the trial court to fix penalty: "If they [the jurors] had [scruples], and knowing that the court might inflict the death penalty, they might refuse to return a verdict of guilty even though the evidence and the law might justify it." In short, "It is impossible to separate the verdict from its consequence, the punishment." People v. Tanner, 2 Cal. 257, 259 (1852) Surely a juror unalterably opposed to capital punishment and unable to return a death verdict would have difficulty fairly weighing alternatives, one of which could later result in a death penalty, when he could simply force a mistrial, an acquittal or a conviction of a lesser included offense and thereby prevent imposition of the death penalty.[13] See People v. Carpenter, 13 Ill. 2d 470, 476, 150 N.E. 2d 100, 103 (1958) (Challenge allowed for jurors sitting on a trial to determine mental competency to be executed.)

The policy of having the judge decide the penalty may be undesirable because it totally eliminates any community participation in setting the death penalty, and it is doubtful that this procedure would benefit defendants. See Bell v. Patterson, — F. Supp. —, 2 Crim. L. Rptr. 2426 (D. Colo. 1968). We need only note how rarely a

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13. The suggestion that a second jury be impanelled is somewhat insincere in light of the fact that petitioner goes beyond the scope of the litigation to insist that a qualified jury is not impartial on the issue of punishment.

jury is waived in a case where the state seeks the death penalty. And, of course, the defendant has the protection of the requirement of unanimity of twelve jurors on the issue of punishment.

The policy of having only one jury to decide the issue of guilt and punishment has great merit especially in light of the fact that the only real issue at most capital trials is the issue of punishment.[14] The evidence of guilt is extremely relevant to the issue of punishment. The single jury which hears it at a contested trial may be influenced to recommend mercy by the evidence. A second jury would not hear the evidence of guilt, or if they did, they would not hear it vigorously contested by a defendant who stands proven guilty beyond a reasonable doubt and no longer can assert his innocence. Finally there can be no shifting of responsibility in a single jury procedure. The second jury may well lose hesitancy to fix the death penalty since they can put the heaviest responsibility on the first jury and the first jury can do the same thing on the issue of guilt. Certainly the full scope of aggravation evidence admissible at a separate penalty trial has not substantially aided the tactical position of defense counsel in California.

What is incomprehensible to us about petitioner's argument is that each of these procedures is far more beneficial to petitioner than the older procedures which made the death penalty mandatory upon conviction. No constitutional challenge could be made to such a procedure.

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14. This procedure may operate as did the Illinois procedure, at the time of petitioner's trial where the jury determination of punishment is final. Or it may operate as the Illinois procedure today with discretion in the trial court to disregard the recommendation of the death penalty and discretion in the reviewing court to reduce sentence.

Williams v. New York, 337 U.S. 241, 252 (1948). No one can seriously dispute the necessity of having a jury free of conscientious scruples against the death penalty in such a case. (See Petr's. Brief, p. 37, p. 39, fn. 1). Yet when the mandatory death penalty is amended to the benefit of defendants in capital cases, it is said that now the state is unfair.

The point of all this is not that any of these various procedures is the best or that bifurcated trials and judicial sentencing are improper. There are good reasons for adopting each procedure.[15] Each procedure has benefits for and effects on the defendant that are not present in the other procedures. The procedures are not identical in their effect on individual defendants. Where there are such differences, the policy decision of each individual state to adopt one or another should be sustained. See Johnson v. Commonwealth, — Va. —, 158 S.E. 2d 725, 730-31 (1968). In Spencer v. Texas, 385 U.S. 554, 560 (1967) this court noted that the states have always been given great leeway in dividing responsibility between judge and jury in criminal cases. The Court then sustained a Texas procedure whereby the jury was given evidence of prior convictions in order to sustain an habitual criminal count in an indictment. This was Texas practice even when the defendant

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15. Today thirty-four states, the District of Columbia and eight federal statutes give the jury discretion to impose a sentence of death binding upon the court. Five states provide for a separate penalty trial before the jury that decides the guilt of defendant. Four states provide for a mandatory death penalty in certain cases. Three states and two federal statutes give discretion to the jury but allow the court to give a lesser sentence if the jury recommends death. One state allows the court to pronounce sentence of death even when the jury recommends a lesser sentence. One state provides for judicial sentence of death without jury participation in certain cases. See Appendix B

offered to stipulate to the convictions. Certainly the present case presents a procedure with far stronger policy justification and far stronger state interest than was found in Spencer. The doctrines in Spencer apply *a fortiori* to the present case.

Finally, we note that the petitioner has never established the essential point that the Illinois procedure does not give him a fair and impartial jury. The possibility of alternative procedures can scarcely arise in this context.

3. *The methods and assumptions underlying petitioner's argument are inconsistent with the duty of jurors to follow the law and return a verdict according to the evidence, with the entire system of challenges for cause pervading the selection of American juries, with the voir dire method of selecting juries and with the clear constitutionality of general jury qualification statutes found in all the states.*

The petitioner's argument, and, in particular, his method of challenging settled law will, if accepted, present a serious challenge to the legal process, a challenge that goes beyond the scope of capital cases and indeed, beyond the scope of criminal cases.

The assumption implicit in the petitioner's argument[16] is that he has a right to have a jury composed of persons who will or are likely to nullify and disregard the law and the evidence. Yet "a verdict on the evidence . . . is all an accused can claim, he is not entitled to a set-up that will give a chance to escape after he is properly proven guilty." Fay v. New York, 332 U.S. at 288-89. It is true that the jury has the power to disregard the law and the evidence but it is not their right to do and it is not the

16. And made explicit in Petitioner Bumper's brief.

petitioner's right to have them do so. Petitioner has not contested his guilt in any appeal.

Jurors serve as finders of fact, they are bound by law, by rulings on evidence and instructions. They are, in the vast majority of American states, not judges of law. The function of the jury is to weigh the evidence and return a verdict consistent with the evidence and the law. The jury has the right to nullify law only when it serves as judge of the law as it did in England in cases of criminal libel. See Pierce v. State, 13 N.H. 536.

A single juror can effectively nullify the law for under prevailing procedure (including Illinois) neither a verdict of guilty nor a punishment of death can be returned without the concurrence of all twelve jurors. See Andres v. United States, 333 U.S. 740, 766 (1948) (concurring opinion).

The variety of disqualifications of veniremen who will not follow the instructions of the court or who are biased against a particular law is quite impressive.

The prosecution, and sometimes, the defense are entitled to exclude from jury service those who will not convict on circumstantial evidence,[17] those with bias against gambling laws,[18] prohibition laws,[19] abortion laws, statutory rape laws.[20] The prosecution is entitled to exclude

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17. Commonwealth v. Shushinskie, 242 Pa. 406, 413, 89 Atl. 564, 566 (1913); Smith v. State, 55 Ala. 1. (1876) See Hardy v. United States, 186 U.S. 224 (1902).

18. Smith v. United States, 112 F. 2d 217, 218-19 (D.C. Cir. 1940). (Numbers player disqualified from sitting in trial of numbers operator.)

19. McClure v. State, 103 Tex. Crim. 158, 280 S.W. 784 (1926); Stremler v. State, 15 Ala. App. 600, 601, 74 So. 727, 728 (1917).

20. State v. Normingdale, 154 La. 523, 526, 97 So. 798, 799 (1923).

veniremen who would give no weight to the testimony of an informer or accomplice.[21]

There is also a disqualification of jurors who will not abide by the felony murder rule[22] or who will not convict an accomplice of murder when the accomplice did not do the killing.[23] A venireman who believes that polygamy is divinely commanded is not qualified to sit in a bigamy trial.[24] A more recent example is the increasing public disapproval of certain narcotics laws.

The juror who will give weight to a legally irrelevant fact is not qualified to serve as a juror, e.g. the age of the victim in a statutory rape case,[25] the age of the defendant[26] or the sex of the defendant.[27] Presumably a juror whose code of honor demands that death avenge an insult is not fit to serve in a case where one man kills another over an insult just as a juror who thinks the killing of an unfaithful wife or lover is justified.[28]

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21. State v. Flint, 60 Vt. 304, 315, 14 Atl. 178, 184 (1888).

22. State v. Bunk, 4 N.J. 461, 468, 73 A. 2d 249, 253 (1950); People v. Wolff, 182 Cal. 728, 736, 190 Pac. 22, 25-26 (1920); Part v. State, 112 So. 2d 380, 382-83, (Sup. Ct. Fla. 1959).

23. Commonwealth v. Bentley, 287 Pa. 539, 554, 135 Atl. 310, 312 (1926).

24. Miles v. United States, 103 U.S. 304, 310 (1880); Reynolds v. United States, 98 U.S. 145, 157 (1878).

25. State v. Pettit, 33 Idaho 326, 332-33, 193 Pac. 1015, 1017 (1920).

26. State v. Hunter, 183 Wash. 143, 152-53, 48 P. 2d 262, 267 (1935).

27. Ray v. People, 63 Colo. 376, 378-79, 167 Pac. 954, 955 (1917).

28. Jones v. People, 23 Colo. 276, 279, 47 Pac. 275, 276 (1896); People v. Decker, 157 N.Y. 186, 192, 51 N.E. 1018, 1020 (1898).

A juror who believes the punishment prescribed by law is too severe is also unqualified to serve[29] as is a juror with scruples against a penitentiary sentence in a felony case.[30] And of course a juror who believes that God, and not man, should punish is not a fit juror.[31]

Surely the petitioner could prove that persons with scruples and beliefs against particular laws will be less likely to convict than persons who are not opposed to such laws. The defendant against whom the primary witness is an informer or accomplice is tried before a jury from whom all who would disregard the testimony out of principle are excluded. A man who kills another for an insult is tried before a jury without a single juror who believes as he does. And what of the abortionist and the gambler. Surely many Americans are antipathetic to laws restricting gambling and abortion. And in past times what of the bootlegger in the prohibition era or the Mormon polygamist in Utah in the late 1800's. In all of these cases the defendant could avail himself of petitioner's argument.

The defendant, too, has his challenges for cause. A juror who will not exercise his discretion to give the defendant the benefit of a suspended sentence statute is disqualified.[32] The juror who declares that all abortions are

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29. Carr v. State, 91 Okla. Crim. 94, 99, 216 P. 2d 333, 336 (1950); State v. Curtis, 108 Kan. 537, 540, 196 Pac. 445, 446 (1921); State v. Taylor, 323 Mo. 15, 26, 18 S.W. 2d 474, 478 (1929).

30. Stalls v. State, 28 Ala. 25, 27 (1856).

31. Green v. State, 147 Tenn. 299, 312-13, 247 S.W. 84, 88 (1923).

32. Fernandez v. State, 82 Tex. Crim. 129, 198 S.W. 301 (1917).

always wrong is not fit to serve in an abortion prosecution.[33] Strong prejudice against narcotics offenders is a challenge for cause especially in entrapment cases.

The venireman who gives weight to irrelevant factors is also disqualified, i.e. the juror who would be inclined to give more weight to the testimony of a police officer merely because he is a police officer,[34] or the venireman who would convict more readily if the victim were a police officer.[35]

In income tax evasion cases involving gamblers prejudice against those who accept wagers or religious scruples against gambling is a ground for disqualification.[36] Prejudice or scruples against the insanity defense justifies a challenge for cause,[37] as does prejudice against the defense of self defense.[38]

Where the jury decides the validity of a consent search, a venireman who has a notion of a consent search less favorable to the defendant than the law's notion it is error not to sustain the defendant's challenge.[39]

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33. People v. Murawski, 2 Ill. 2d 143, 147, 117 N.E. 2d 88, 90 (1954).

34. Sellers v. United States, 271 F. 2d 475, (D.C. Cir. 1959).

35. Salazar v. State, 149 Tex. Crim. 260, 262, 193 S.W. 2d 211, 212 (1946).

36. United States v. Clancy, 276 F. 2d 617, 632 (7th Cir. 1960); Lurding v. United States, 179 F. 2d 419, 421 (6th Cir. 1950).

37. Jones v. State, 60 Tex. Crim. 139, 142, 131 S. W. 572, 573 (1910); Territory v. Lum Dim, 23 Haw. 792 (1917).

38. Webb v. Commonwealth, 314 S.W. 2d 543 (Ky. 1958); People v. Bennett, 79 Cal. App. 76, 88, 249 Pac. 20, 25 (1926); Meador v. State, 94 Tex. Crim. 608, 611, 253 S.W. 297, 299 (1923).

39. Fisher v. State, 37 Okla. Crim. 393, 259 Pac. 153, (1927).

The only reason for these challenges is the fear that the juror will not follow the law and the evidence. The rationale behind the best known defense challenge is that because of television and newspaper publicity a juror will not base his verdict on the law and the evidence.[40] The veniremen challenged by the defense would probab be more likely to convict than acquit yet the state could hardly claim that this was a reason for keeping them on the jury. If the defendant is entitled to disqualify jurors who are likely to base their decision on something other than law and the evidence why is the state not so entitled?

The realm of civil trials is not unaffected by petitioner's argument. Prejudice or bias against a statute of limitations defense,[41] against suits brought by non residents,[42] against damage actions for back injuries[43] and against personal injury-negligence suits in general[44] all serve to disqualify civil jurors. In a civil suit a juror must follow the court's instructions on the last clear chance doctrine.[45] A juror who could not award child cus-

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40. We would note that in a case of great publicity the numbers of jurors excused for cause due to partiality will far exceed the number excused for scruples in a capital trial.

41. Towl v. Bradley, 108 Mich. 409, 66 N.W. 347 (1896).

42. Naylor v. Metropolitan St. Ry. Co., 66 Kan. 407, 71 Pac. 835, (1903).

43. Leibman v. Curtis, 138 Cal. App. 2d 222, 223-25, 291 P. 2d 542, 544 (1955).

44. Galveston, H & S.A. Ry. Co. v. Manns, 37 Tex. Civ. 356, 357, 84 S.W. 254, 255 (1904); Jacobson v. Julian, 246 Md. 549, 554, 229 A. 2d 108, 112 (1967).

45. Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 746, 136 Pac. 523, 528 (1913).

tody to a woman who drinks [46] is not a fit juror in a custody case nor is a juror with religious scruples against divorce a fit juror in a divorce case.[47] See Littell v. Bi-State Transit Development Agency, 423 S.W. 2d 34, 36-38 (Mo. App. 1967).

Jurors views on damages in a civil case, like those on penalty in a criminal case, are the bases of disqualification either where the juror would not award what the law allows [48] or would require extra proof [49] or would always give a "bonus".[50]

The juror who believes in absolute liability for railroads is not a fit juror where the railroad is a defendant.[51] In an area where there is widespread disagreement among the citizenry about the philosophy of a dram shop act a plaintiff must be allowed to determine if a venireman has any prejudice against dram shop actions.[52]

In all of these civil actions the party complaining about the disqualification could probably produce evidence if he could afford a survey that the excluded juror was more

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46. Flowers v. Flowers, —— Tex. Civ. ——, 397 S.W. 2d 121, 123 (1965).

47. Smith v. Smith, 7 Cal. App. 2d 271, 273, 46 P. 2d 232, 233 (1935).

48. Bunda v. Hardwick, 376 Mich. 640, 660-63, 138 N.W. 2d 305, 311-14 (1966).

49. Snyder v. General Electric Company, 47 Wash. 2d 60, 66, 287 P. 2d 108, 112 (1955).

50. Kentucky Utilities Co. v. Jett, 391 S.W. 2d 677, 678 (Ky. 1965).

51. Ruby v. Chicago, M. & St. P. Ry. Co., 150 Iowa 128, 131, 129 N.W. 817, 818 (1911).

52. Schnieder v. Kirk, 83 Ill. App. 2d 170, 176, 226 N.E. 2d 655, 658 (1967).

likely to bring in a verdict favorable to him and that, if disagreement with a given law, like the dram shop act, was widespread, he was tried by a nonrepresentative jury of persons unsympathetic to him. In fact, such argument was made in part in Grossfield v. Braverman, 203 Md. 498, 502, 101 A. 2d 824, 826 (1954). In that case the trial court excused a veniremen who displayed prejudice toward the law which permitted a sister to recover damages, under proper circumstances, from her brother because of injuries sustained in an automobile accident. The defendant (presumably an insurance company) protested that the elimination of such veniremen deprived the defendant of the very jurors who were most suspicious of collusion in cases like this and prejudiced the defendant's attempt to convince the jury of collusion. The Court held that the law permits these family actions and that the plaintiff is entitled to a jury that has no preconceived notion disfavoring them. It deemed the presumption that those who did not object to such suits would not be convinced of collusion by proper evidence to be a *non-sequitur*.

The petitioner seeks to overturn one aspect of this rather extensive structure of challenges for cause by means of opinion polls and psychological studies. If the attack is sustained as to one area, it may well prevail against all.

Of equal significance is the fact that opinion polls and psychological studies are the vehicles which petitioner wishes to substitute for the classic voir dire method of determining jury qualification. Voir dire examination is based on the belief that a man's straightforward answer can usually be taken at face value except in the most ex-

traordinary situations.[53] Psychological theory, or at least some theories, do not accept this. Voir dire procedure deals with direct questions, a juror is asked if he has bias, prejudice, scruples or opinions relating to the specific issues and case before the jury. Psychological testing deals with the indirect question unrelated to the specific case. The petitioner must claim that the techniques of psychological testing should be substituted for or added to the method of voir dire. This is, in fact, what petitioner has done.

But the petitioner cannot stop here. If the voir dire is inadequate to test fairness and impartiality in the present case it surely is not adequate in other cases. Perhaps the end result will be that veniremen in Cook County will take a battery of psychological tests the results of which shall be given to counsel in each case. Yet this might not be adequate for the psychologists who studied the authoritarian personality would not even rely on their questionnaires but insisted on a clinical evaluation of each of their subjects. If that seems far fetched how about allowing counsel to ask questions like those usually found on verbal psychological tests. This at least has been tried, but disapproved. Commonwealth v. McGrew, 375 Pa. 518, 524-25; 100 A. 2d 467, 469-70 (1953). Of course a psychologist would have to be present in court to interpret the answers to such questions. And even if this is thought to go too far what about permitting a close inquiry on voir dire with respect to the juror's salary, attitude toward his work, religious beliefs, and political preferences. All of those matters are significant psychologically but unless there is some close relation between them and an issue in

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53. Compare Irwin v. Dowd, 366 U.S. 717, 722-24 with Beck v. Washington, 369 U.S. 541, 555-58 and Dennis v. United States, 339 U.S. 162, 169-71.

the case, i.e., religious prejudice toward defendant or complaining witness, the courts will not allow them to be asked. Certainly the existence of conscientious scruples against capital punishment does not reveal enough one way or the other about a man's personality to allow a judgment. Even the advocates of the authoritarian personality theory do not go so far. And if scruples are such a crucial factor affecting all men's judgments then questions concerning them should be asked in every case and not forbidden as they are in non-capital cases. See Hemphill v. Commonwealth, 405 S.W. 2d 956 (Ky. 1965). These are the inevitable results of the fact that the method of proof used by the petitioner extends its inquiry beyond the subjects and issues of a given litigation. And this is antithetical to the concept of voir dire in all criminal and civil trials. Does not petitioner seek what was condemned in these words: "Such minuteness of inquiry into the secret springs of emotion, sentiment and moral . . . action . . . would not only tend to unduly annoy and oppress candid, conscientious and intelligent citizens but also to exclude them from jury service." Funk v. United States, 16 App. D.C. 478, 489 (1900).

The petitioner's argument will be seen to affect federal civil rights prosecutions in which the federal government has sought to disqualify veniremen on the basis of their membership in organizations opposed to civil rights laws and decisions. Now it is true that someone subscribing to the principles of the Ku Klux Klan oath could possibly give the government a fair trial. Just as a juror with conscientious scruples might possibly be able to give the state a fair trial but in both cases there is a "rational foundation" for excluding the juror. To sustain a challenge for cause neither prosecution nor defense must prove beyond a reasonable doubt that the juror's decision will be affected, a reasonable probability is enough. In the civil rights pros-

ecutions virtually all such excluded veniremen will be white and the defendants will be white. In the civil rights prosecutions the level of exclusion in some areas of this country could reach well beyond that found in capital cases on the issue of penalty scruples. And finally it will surprise no one if a survey were to prove that jurors not opposed to the civil rights laws were more prone to convict in civil rights prosecutions than jurors who were opposed. In short, the issue in civil rights prosecutions is the same as the issue in capital cases: is the defendant entitled to have on his jury men who are likely to nullify the law, to disregard the evidence and the law, because a large segment of community sentiment disapproves the law? The answer in both cases is no.[54]

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54. E.g. In State v. Wilkins (No. 155, Second Judicial Circuit of Alabama) the prosecution was denied challenges for cause on the basis of Klan membership when the defendant was being tried for the murder of a civil rights worker, Mrs. Viola Liuzzo. Further, Richmond Flowers, the prosecutor, asked jurors what they thought of a person who worked for negroes' civil rights. Each juror gave his opinion that such a person was "inferior". Mr. Flowers argued that these jurors displayed an outlook that would regard the killing of a civil rights worker as less serious than other intentional killings which view was contrary to Alabama law. The trial judge, improperly in our view, denied each challenge for cause. Naturally, the prosecution failed and the law was not enforced.

In United States v. Price, et al. (S.D. Miss. Crim. No. 5291) the defendants were charged with civil rights violations arising from the murder of three civil rights workers, Schwerner, Chaney and Goodman. During the voir dire the government asked jurors about their affiliations with the Klan and other hate groups. Then the Klan oath was read to these jurors and the jurors were asked if they believed in or subscribed to the principles contained in the Klan oath. Those who answered yes, were challenged for cause. The trial judge, properly in our view, allowed such challenges. The prosecution was successful and the law prevailed.

It is difficult to see how the jury qualification and exemption statutes common to every state could survive an attack similar to that used by petitioner here. These statutes [55] achieve a de jure or de facto exclusion of persons under 21 or 25 years and over 65 or 70 years of age, non-taxpayers, unregistered voters, felons, aliens, women, doctors, lawyers, clergymen, school teachers, newspapermen, policemen and firemen. Hardship exemptions are also granted and these operate to exclude many of those with the lowest incomes. No one would have doubted, until now, the validity of these exclusions. They are based on a rational foundation, that is, most of the persons disqualified would not make competent jurors, most of the persons exempted will render a greater service to the community by pursuing their occupations. This is not necessarily true of every member of the class but it is true of a large number of them and this is sufficient to establish a "rational foundation." In these cases, it would be immaterial if the disqualification and exemption statutes resulted in juries more likely to convict than hypothetical juries containing members of the excluded classes. Indeed, the exclusions may actually have this result, at

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55. E.g. Cal Code of Civil Procedure, Secs. 198-200 (1967).
Illinois Revised Statutes, 1967, Ch. 78, Sec. 2, 4, Ch. 91, Sec. 69.
Mass. Gen. Laws, Ch. 234, Secs. 1-2 (1956).
Mich. Comp. Laws, Sec. 691.1021-22 (1967).
New York, Judiciary Law, Secs. 507, 596, 598-99, 665-65a (Supp. 1967).
Pennsylvania Statutes, Tit. 17, Sec. 1279, 1322, 1333 (1962).
Texas Code of Criminal Procedure, Art. 35.16 (1966) and General Statutes, Art. 2133-35 (1964).
See also 3 Blackstone, Commentaries 361-65;
4 Blackstone, Commentaries 346;
1 Coke, Institutes 156-57.

least in particular cases. Zeisel's unpublished study, cited by petitioner below, "Some Insights Into The Operation of Criminal Juries (University of Chicago, 1957), indicated substantial differences in prosecution and defense "proneness" among women, high income and high age groups and low education groups. Zeisel, pp. 29-31.

Jurors who are aliens might deal more sympathetically with alien defendants than would jurors who are citizens. Minors might forgive more readily than their elders the peccadilloes of a youthful defendant who subscribes to the tenet: "Never trust anybody over thirty." A convicted felon might heed more readily than the law-abiding citizen the Biblical injunction: "Judge not, that ye be not judged." A lawyer-juryman might be a godsend to a defendant relying on a complex technical defense. And a clergyman or nun might well show a good deal more compassion than would an ordinary juror. In Fay v. New York, 332 U.S. at 292, the Court noted that under petitioner's theory a policeman might never get a fair jury. Nor would a fireman, a doctor or a lawyer. Surely the jury qualification statutes must fall if judged by petitioner's standards.

CONCLUSION

The petitioner was tried by a representative jury selected from the community in which he committed his capital offense. Measured by any of the tested legal standards and the overwhelming evidence presented to it, this jury was undeniably fair and impartial in both its conclusions as to guilt and punishment.

What in reality has been presented to the Court is an insubstantial attack upon what the petitioner charaeter-

izes as "the State's increasingly questionable and unpopular interest in obtaining the death penalty." However attractive the petitioner's thinly disguised assault upon a State's appropriate legislative decision to provide for a death sentence. it is without constitutional merit both historically and practically. For this Court to adopt a "popular" sentiment test as a significant factor in the determination of constitutional question, would be to lessen the judicial force and reasoning buttressing many of this Court's recent pronouncements concerning the criminal process. One cannot but wonder how many of our individual constitutional rights would survive the "popularity" test. It may be emotionally appealing, but is legally improper to think of and treat capital cases as *sui generis*. The issue of capital punishment and the manner of its imposition has a proper forum and such a forum is the appropriate legislative body. The nullification of law is a policy decision which rests with the People acting through their elected representatives and not with the individual citizen acting as a juryman.

The judicial sanctioning of the application of public opinion polls and psychological questionnaires could not be limited to capital cases. The wake of such a decision on jury qualification would engulf all "unpopular" legislation such as civil rights, drug control and taxation. If reliance is placed upon psychological questionnaires or testimony virtually no challenge for cause could survive. If the voir dire examination is not sufficient to assure fairness in capital cases, it surely is not sufficient to provide this protection in any other case. In every case veniremen will be compelled to answer "attitude revealing" questions. The voir dire conducted in the petitioner's trial assured and provided him of a fair and just verdict. He truly only

questions his punishment not his adjudication of guilt. Understandably this is his concern—and that of the community which suffered his offense. But the penalty and its manner of determination in no way can be elevated to the status of a constitutional violation. The judgment of the jury should be affirmed.

Respectfully submitted,

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APPENDIX A.

The Voir Dire Examination Of The Twelve Jurors Selected To Try Petitioner.

R 705 BLANCHE CARLSON, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Cernek.

Q. Will the lady next to Mrs. Formanek give me your name, madam?

A. Blanche Carlson.

Q. Is that Miss or Mrs.?

A. Mrs.

Q. Mrs. Carlson, where do you live?

R 706 A. 5400 S. Avers.

Q. And with whom do you live at that address?

A. My husband.

Q. What type of work does he do?

A. Assistant traffic manager.

Q. Where?

A. Glaser Crandell.

Q. What type of work is that?

A. Oh, you know, all different rates.

Q. He works downtown?

A. No. They're on 20th and Western.

Q. And are you employed?

A. The same place.

Q. And what do you do?

A. Machine operator.

Q. How long have you lived at 5400 S. Avers?

A. Four years.

Q. Before that, where did you live?

A. 727 California Terrace.

Q. Where is California Terrace?

A. That's right off of Clark, Clark Street around Belmont and in through there.

Q. Do you have any brothers or sisters?

A. I've got three brothers and two sisters.

R 707 Q. What do your brothers do?

A. One's a truck driver.

Q. Who does he work for?

A. Central-Wisconsin.

Q. And the other brother?

A. One works in the stockroom.

Q. For whom?

A. Bloomfield.

Q. Where are they?

A. 47th and Cicero.

Q. And the other brother?

A. He's a riveter.

Q. And you say you have a sister?

A. Two sisters.

Q. What do they do?

A. One works at the same place I do.

Q. The husbands?

A. They're both widows.

Q. What type of work do they do?

A. Factory work.

Q. Your father. What type of work?

A. My father's deceased.

Q. What type of work did he do?

A. He used to work for the city.

R 708 Q. In what capacity?

A. In the alleys, cleaning. I don't know what you call that.

Q. Do you have any relatives or friends who are policemen?

A. No.

Q. Is this your first day in the building?

A. Yes, sir.

Q. Did you hear the questions that I asked of Mrs. Heimann here a short time ago?

A. Yes, sir.

Q. If I asked you those same questions, would your answers be substantially the same?

A. Yes, sir.

Q. Do you think you could give the State and the defendant here a fair trial?

A. Yes, I do.

Q. You'd like to sit on this jury and hear the evidence?

A. I think I would.

Q. Have you or any member of your family ever been the victim of a criminal offense?

A. No, I haven't.

Q. You have never been in court before, is that right?

A. No.

R 720 Blanche Carlson, was examined as follows:

Examination by Mr. Kissane.

Q. Mrs. Carlson, do you spell Carlson with an "o" or an "e"?

A. C-a-r-l-s-o-n.

Q. That's the way I wrote it. Now, in addition to living at 5400 S. Avers, have you lived in and
R 721 around Chicago all your life?

A. Yes, sir.

Q. Did you attend school here?

A. Yes, I did.

Q. What schools did you attend?

A. John Spry School. Grammar school, that's all.

Q. Is that on the south side?

A. Right here on 24th and Marshall Boulevard.

Q. Now, prior to your marriage, what was your name?

A. Roth, R-o-t-h.

Q. Have you ever heard of this case before?

A. No.

Q. Do you know anyone at the table, any of the lawyers?

A. No.

Q. Or the defendant?

A. No.

Q. Do you recognize any of the names of the witnesses that were read?

A. No.

Q. And you have never been in a courtroom prior to today?

A. No.

Q. Do any of the questions asked of any of the
R 722 preceding ladies and gentlemen bring anything to your mind, Mrs. Carlson, that would cause you to feel you cannot be a fair and impartial juror?

A. No.

Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. No.

Q. Now, if you're selected as one of the twelve jurors, will you base your verdict solely on the evidance as it is testified to on the witness stand?

A. Yes, sir.

Q. And the rules of law as given by his Honor Judge Salter?

A. Yes, sir.

Q. You won't bring into your deliberations of the jurors something from outside of this courtroom, is that correct?

A. That's correct.

Q. And if that was your thought, you'd tell us now, isn't that so?

A. Yes, I would.

Q. If you're selected as one of the twelve jurors and it should be your opinion, along with the other ju-
R 723 rors after you heard all the testimony on the witness stand and the rules of law given by his Honor and

you're back in the jury room deliberating on the verdict and you find that the defendant Witherspoon is guilty of killing Officer Mitchell Stone and that the proper verdict in this case, based on the law and the evidence, is death in the chair, would you so say by signing a guilty verdict?

A. Yes, I would.

R 724 CECELIA LOHMEIER, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

Q. The lady who just moved into the panel. Your name, please?

A. Cecelia Lohmeier, L-o-h-m-e-i-e-r.

Q. You pronounce the name Lohmeier?

A. Yes, sir.

THE COURT: Speak a little louder. This man has to write it all down and he's not joking about being hard of hearing. He actually is a little hard of hearing, so speak up.

MR. KISSANE: Q. Your home address, please?

A. 4940 West Kinzie Street.

Q. How long have you lived at that address?

A. 14 years.

R 725 Do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. No, sir.

Q. Now, with whom do you reside at 4940 West Kinzie?

A. With my husband and two sons and my husband's aunt.

Q. Could you talk a little louder, please?

A. It's my husband's aunt, two sons and my husband.

Q. What's the nature of your husband's employment?

A. He's a CTA driver.

Q. In general, how long has that been his employment?

A. Abaut 15 years.

Q. Are you gainfully employed?

A. Part time.

Q. What is the nature of your employment?

A. I work part time in a pastry shop.

Q. Where's that located?

A. On 174 North Cicero.

Q. Right close to your home?

A. That's right.

Q. Now, your two boys are going to school, are
R 726 they?

A. Yes, sir.

Q. And what school are they attending?

A. At the Navy Pier. The University of Illinois.

Q. Both boys are going to the University of Illinois?

A. Yes.

Q. Are they both following the same type of studies?

A. That's right.

Q. And what would that be?

A. Accounting.

Q. Have you yourself lived in and around Chicago all your life?

A. No, I haven't.

Q. Prior to coming to this area, where did you reside?

A. In Wisconsin. Oshkosh.

Q. And you attended schools up in Oshkosh?

A. That's right.

Q. What schools did you attend?

A. Sacred Heart Catholic School and Oshkosh Public High School.

Q. Prior to your marriage, what was your name?

R 727 A. Kallous, K-a-l-l-o-u-s.

Q. Now, did any of the questions asked of any of the preceding ladies and gentlemen bring anything to your mind that indicated to you you cannot be a fair and impartial juror?

A. No.

Q. You understand the charge in this indictment is that of murder, do you?

A. That's right.

Q. You understand the charge is that on the particular date named the defendant Witherspoon killed a police officer by the name of Mitchell Stone, do you?

A. That's right.

Q. Now, do you understand, as a juror, that the only thing you're to consider, as to what the facts are, is what you hear testified to under oath?

A. Yes, sir.

Q. And, similarly, as to the rules of law you're to follow, do you understand the rule of law you're to follow is the rule of law as given by his Honor, Judge Salter?

A. Yes, sir.

Q. Now, you wouldn't bring into your deliberations as a juror something that transpired outside the
R 728 courtroom, is that correct?

A. No.

Q. Now, if you're selected as one of the twelve jurors, after having heard all the evidence and the rules of law as given by his Honor, and you're back in the jury room, and it should be your opinion, along with the other eleven, that the defendant Witherspoon is guilty of the murder of Officer Stone, and the proper penalty, under the law and the facts in this case, is that of death in the chair, would you so say by signing a guilty verdict and fixing death in the chair as the penalty?

A. Yes.

Q. And you will not let sympathy or prejudice affect your service here as a juror, is that correct?

A. That's right.

R 739 VICTORIA BLAHA, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

Q. The lady who moved into the back seat. Your name, please?

A. Victoria Blaha.

R 740 Q. Your home address, please?

A. 4319 West Monroe.

R 747 Q. Miss Blaha, how long have you lived at 4319 West Monroe Street?

A. Twelve years.

Q. With whom do you reside at that address?

A. I'm alone since January 1st.

Q. Have you lived in and around Chicago all your life?

A. Yes, I have.

Q. You lived on the west side all your life?

A. That's correct.

Q. Did you attend schools there?

A. Yes.

Q. What schools did you attend?

A. Tilden Public and Austin High.

Q. Are you gainfully employed?

A. I'm gainfully employed at the present time, yes.

Q. What's the nature of your employment?

A. Claim Department for an insurance company.

THE COURT: You jurors on the last two rows may come up and occupy this section (indicating) so you will be a little closer.

R 748 All right, proceed, counsel.

MR. KISSANE: Yes, sir.

Q. What is the name of the company that you are employed by?

A. Travelers Insurance Company.

Q. How long have you worked for Travelers?

A. 34 years.

Q. Now, do you have other members of your family living in and around Chicago?

A. Yes. I have a brother working for the Commonwealth Edison Company.

Q. And, in general, has that been his employment, his work life?

A. For 34 years.

Q. Do you understand that the charge in this indictment is murder? Do you?

A. Yes, I do.

Q. And Mr. Cernek has told you that the charge involved the defendant Witherspoon killing an officer by the name of Mitchell Stone. Do you understand that?

A. I do.

Q. Now, is there anything about the charge of murder that starts you off feeling sympathetic in
R 749 this case?

A. No, there isn't.

Q. Is there anything about the charge that would cause you to feel that you are prejudiced?

A. No, there isn't.

Q. And if you're selected as one of the twelve jurors, will you base your verdict solely on the evidence as it is testified to on the witness stand under oath?

A. I will.

Q. You wouldn't bring into your deliberations as a juror something from outside the courtroom, such

as TV, newspapers or something you picked up in your reading as to how a trial should be or what the facts should be, would you?

A. No, I wouldn't.

THE COURT: Mr. Kissane, let me make this suggestion. Those last two or three questions you have asked, these jurors have heard them time and time again and they understand and they know what this case is all about, so just ask the general question. You heard the general questions asked the preceeding jurors, you understand what this is all about and is there any reason why you can't be a fair juror?

R 750 Ask any question you want about their background but, as for going into the details of the murder charge, they have all been here and they understand what both sides want.

Do you understand that?

MR. KISSANE: Yes, Judge.

THE COURT: Start to do that and we will save time that way.

MR. KISSANE: Yes, Judge.

Q. Now, when you were seated out in the courtroom and in the box, did anything come to your mind that indicated to you you could not be a fair and impartial juror?

A. No, there wasn't anything.

Q. Now, if you're selected as one of the twelve jurors, would you base your verdict solely as to what the facts are on what you hear testified to under oath from the witness stand?

THE COURT: You don't need to answer that.

Now, she understands that. They all understand that. I have told them that, to start with, and I think both lawyers have asked that question and the jurors understand that this case has to be tried on the evidence they hear from the witness stand and the law
R 751 that the court gives to them. Proceed.

MR. KISSANE: Yes, sir.

Q. If you're selected as one of the twelve jurors and you have heard all the evidence and the instructions of his Honor and you're back in the jury room and it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of murder and that the proper verdict in this case is that of death in the chair, would you say so by signing a guilty verdict?

A. I would.

Q. Have you ever been in a courtroom prior to coming here as a juror?

A. No, I have not.

Q. Have you ever heard of this case before?

A. No.

Q. Do you know any of the counsel at the table?

A. No, I don't.

Q. You didn't recognize any of the names of the witnesses?

A. No.

Q. As you sit there now, do you feel that you can give the defendant and the State a fair and impartial
R 752 trial?

A. I do.

R 758 *Examination by Mr. Cernek.*

Q. Is that Miss or Mrs. Blaha?

A. It's Miss.

R 759 Q. Miss Blaha, what other members of the family are there aside from yourself? Do you have any brothers or sisters?

A. Just a brother.

Q. What does he do?

A. He's a sales promoter for the Commonwealth Edison.

Q. And you have been a resident of Chicago all your life?

A. Right.

Q. How long have you been with Travelers?

A. 34 years.

Q. And you're in the Claim Department, is that right?

A. That's right.

Q. Now, is that automobile liability?

A. All lines.

Q. And is your job typing up drafts and letters and so forth?

A. No. Getting lien claims ready for the attorneys.

Q. Would the fact that a young police officer met his death in this case cause you to start out with a feeling one way or another in this matter?

A. No, it doesn't.

Q. If it develops that the State proves in this court that the defendant here, William Witherspoon,

had a prior conviction of some sort, would that cause you to feel prejudiced against the defendant?

A. No.

Q. You'd reserve your judgment in the case until you had heard all of the evidence, is that right?

A. Right.

Q. You understand that the State has the burden of proving him guilty beyond a reasonable doubt?

A. I do.

Q. And you have no quarrel with that?

A. No.

Q. He doesn't need to prove anything here under our law. You understand that?

A. Yes.

Q. And you have had no prior jury service?

A. No, I didn't.

R 752 WILLIAM BEUKE, called as a prospective juror, being first duly sworn, was examined as follows:

R 753 *Examination by Mr. Kissane.*

Q. The gentleman who moved into the first panel. Your name, sir?

A. William Beuke, B-e-u-k-e.

Q. Your home address, sir.

A. 12230 South Loomis.

Q. How long have you lived at that address?

A. Five years.

Q. And with whom do you reside there?

A. My wife and two children.

Q. How old are your children?

A. Thirteen and two and a half.

Q. What's the nature of your employment?

A. I'm a professional photographer.

Q. And by whom are you employed?

A. The Peoples Gas Light and Coke Company.

Q. How long have you worked for the People's Gas?

A. 24 years.

Q. And all the time you worked for Peoples Gas your employment has been that of a photographer?

A. That's right.

Q. Have you lived in and around Chicago all your life?

R 754 A. Yes, sir.

Q. What schools did you attend?

A. Cook Elementary and Englewood High.

Q. Is your wife gainfully employed?

A. No, sir.

Q. Prior to your marriage, was she employed?

A. Yes, sir.

Q. Just, in general, what type of work did she do?

A. Worked for the Illinois Bell Telephone Company as an operator.

Q. Now, did any of the questions asked of any of the preceding jurors brought anything to your mind that indicated to you you could not be a fair and impartial juror?

A. No, sir.

Q. You understand, do you, that the charge in this indictment is that of murder?

A. I do.

Q. And you don't know any of the counsel at the table?

A. No, sir.

Q. You didn't recognize the names of any of these witnesses that his Honor read yesterday?

A. No, sir.

Q. Were you here yesterday when the Judge read
R 755 the list of witnesses?

A. Yes, sir.

THE COURT: Oh, every juror in the room has heard that—those in the box and those back there. That's all been settled.

MR. KISSANE: We're starting out on a fresh day and I want to be sure what the situation is.

THE COURT: You may be sure that every juror in the courtroom heard the list of witnesses read.

MR. KISSANE: Yes, Judge. Thank you.

Q. Now, have you ever been in a courtroom prior to coming here yesterday, on Monday?

A. Yes, sir.

Q. And where would that be?

A. Downtown.

Q. Was that as a juror or a witness or a party in a case?

A. As evidence.

Q. You testified in a case?

A. That's right.

Q. Were you just a witness or were you one of the parties involved in the litigation?

A. A witness.

Q. Now, do you carry over, from that experience,
R 756 anything that would affect your service here as a juror for the charge of murder?

A. No, sir.

Q. And as you sit there now, knowing your past experience in life, is there anything that comes to your mind that you think would affect your service here as a juror?

A. No, sir.

A. Is there anything in your mind, yesterday or today, that indicated to you that you could not be a fair and impartial juror?

A. No.

Q. If there was you'd tell us now, wouldn't you?

A. Yes.

Q. You understand that these questions are to familiarize yourself with your duties here as a juror and also, in turn, have counsel be familiar, you know, with your service here. Do you understand that?

A. Yes, I do.

Q. Now, the penalties in this State, where the charge is murder, is that of death in the chair, life or any number of years from 14 upwards, such as, 199 or any number of combinations of years the juror feels proper under the law and the evidence in any
R 757 particular case. Do you understand that?

A. Yes, I do.

Q. Now, where the charge is murder, the jurors, in addition to determining the guilt and innocence, in determining the guilt of the defendant, have the additional duty of fixing a penalty they deem proper under the law and the evidence of the case. Do you understand that, sir?

A. Yes, sir.

Q. Now, is there anything about the fact that you have to determine guilt or innocence and also fix a penalty that you'd regard as an undue hardship or burden? Would you find it an unusual hard or difficult burden to assume the fact that you'd have to determine the guilt or innocence and fix a penalty upon the determination of guilt?

A. No.

Q. Now, if you're selected as one of the twelve jurors and it should be your opinion, along with the other eleven jurors, after having heard all the evidence and the rules of law given by His Honor and you're back in the jury room, it should be your opinion, along with the other eleven, that the defendant is guilty, and the next part of your deliberation is
R 759 to fix a penalty, and when you're at the penalty part of the deliberations it should be your opinion, along with the other eleven jurors, that the proper verdict in this case is that of death in the chair, based on the evidence as you have heard it here and the rules of law given by his Honor, would you so say by signing a guilty verdict?

A. Yes,

Q. So, as you sit there now,—

You pronounce your name Mr. Beuke?

A. Beuke.

Q. (Continuing) —do you feel that you can give the defendant and the State a fair and impartial trial?

A. Yes, sir.

R 761 *Examination by Mr. Cernek.*

Q. Mr. Beuke, you have been with the Peoples Gas since leaving school, is that correct?

A. No, not since leaving school?

Q. What did you do before your present job?

A. The same type of work.

Q. And by whom were you employed?

A. Manz Engraving.

Q. Pardon me?

A. Manz Engraving.

Q. Where's that, sir?

A. On Irving Park.

Q. Did you hear anything about this case, Mr. Beuke, before coming to court today?

A. No, sir.

Q. Do you have any brothers?

A. No.

Q. Sisters?

A. Yes.

Q. And how many do you have?

A. One sister.

Q. Is she married?

A. Yes.

Q. What does her husband do?

A. He works for Precision Steel.

Q. Have you or any member of your family ever been the victim of a criminal offense?

A. No.

R 762 Q. You have never been in court before excepting for that one instance as a witness in a civil case, is that correct?

A. Well, it's numerous similar cases.

Q. You have testified quite often, then, in civil matters?

A. Yes.

Q. In your professional capacity as a photographer?

A. Correct.

Q. Of course, you know that the defendant here has an interest in the outcome of this case?

A. Yes.

Q. And if he takes the stand and testifies in his own behalf, you won't let the fact that he has an interest in the outcome influence the weight that you will give his testimony, is that correct, sir?

A. That's right.

Q. In other words, you will use the same rules, in evaluating the credibility of his testimony as you will use in evaluating that of any other witness?

A. That's correct.

Q. And you will give both the State and the defendant a fair trial, is that right?

A. Yes, sir.

R 763 Q. And you will reserve judgment until you have retired to the jury room?

A. Yes.

Q. You have heard the questions that were asked of the other three jurors in the panel. If those same questions were asked of you, Mr. Beuke, would your answers be substantially the same?

THE COURT: Q. What he means by that is, has there been anything that has come out in the question of any ither juror that raises any doubt in your mind that you couldn't be a fair juror?

A. No.

MR. CERNEK: Q. You could be a fair juror, then?

A. Yes.

MR. CERNEK: The defense will accept the panel.

THE COURT: Very well. Let the record show that the first panel of four have been accepted by both sides.

R 772 ERNEST SPARROW, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

Q. The gentleman sitting next to Mr. Stuebe.

A. Ernest Sparrow, S-p-a-r-r-o-w.

R 773 Q. Your home address?

A. 6145 S. Seeley.

Q. And how long have you lived at that address?

A. Three and a half years.

Q. And wiith whom do you reside there?

A. My wife and three children.

Q. How old are your children?

A. Six, three and a half and two and a half.

Q. Prior to your living at 6145 S. Seeley, where did you reside, sir?

A. 7013 S. Rockwell.

Q. I'm sorry, I didn't get that street.

A. South Rockwell.

Q. How long did you live at that address?

A. A year.

Q. What is the nature of your employment?

A. I'm an advertising promotion assistant.

Q. Of what organization?

A. Libby, McNeil and Libby.

Q. How long have you worked for Libby McNeil?

A. 11 years.

Q. 11 years?

A. Yes, sir.

Q. What one of Libby McNeil's products are as-
R 774 signed to you in the way of promotion—baby foods or what?

A. No sir. Vegetables, pickles and olives.

Q. Has that been your employment, your work life, the advertising field, or have you done other types of work or has that been your employment in the advertising field?

A. I have done sales work previously.

Q. What type of products did you sell?

A. Libby's foods and canned foods.

Q. Has Libby been your only employment, your only employer?

A. No, sir.

Q. When you say 11 years as a promotion man, you're including your sales experience along with it?

A. Yes, sir.

Q. Well, prior to working for Libby McNeil, what type of work did you do, sir?

A. I had worked in advertising previously for Sears, Roebuck, for a cleaner and laundry in Memphis, Tennessee, and for the newspaper there.

Q. Did you attend schools down in Memphis?

A. Yes, sir.

Q. What schools did you attend, sir?

A. Memphis State College.

R 775 What did you major in?

A. And the University of Mississippi.

Q. What did you major in, sir?

A. Advertising.

Q. Now, as you sit there now, knowing your past experience in life, is there anything that indicates to you you cannot be a fair and impartial juror?

A. No, sir.

Q. And when those questions were asked by the various counsel and his Honor and myself of the preceding jurors, did anything come to Mr. Sparrow's mind that indicated to him that he didn't feel he could be a fair and impartial juror?

A. No, sir.

Q. If you're selected as one of the twelve jurors, would you base your verdict solely on what you hear testified to under oath and the rules of law as given to you by His Honor?

A. Yes, sir.

Q. And the charge in this case being that of murder, do you understand, sir, the penalties in this State for murder are death in the—

THE COURT: You don't need to repeat that question. Is it your final question? No need to repeat
R 776 that. The jurors all understand it. Ask your final question.

MR. KISSANE: Yes.

Q. Do you understand that as a juror that where the charge is murder that you have the function, where you determine the defendant guilty, to still fix a penalty? Do you understand that, sir?

A. Yes, sir.

THE COURT: You don't need to answer that question. Ask your final question, counsel.

Now, ladies and gentlemen of the jury, you all understand that recently the Supreme Court passed a rule to speed up the picking of jurors and it's even hard for the judges on the bench to adapt themselves to it and it's especially hard for lawyers. We usually take three or four days to pick a jury in a murder case. So when I criticize counsel for both sides and urge them to speed it up, don't blame them because they have been raised on the old system as I have.

Ask your last question, counsel. Go ahead.

MR. KISSANE: Q. Mr. Sparrow, if you're one of the twelve jurors and it should be your opinion, based on the evidence as you have heard it here and
R 777 the rules of law as given by his Honor, that the defendant is guilty of the murder of Officer Stone, based on the evidence here and the law as given by

His Honor, it should be your feeling, along with the other eleven jurors, that the proper penalty in this case is death in the chair, would you so say by signing a guilty verdict?

A. Yes, sir.

Q. So as you sit there—

THE COURT: No. You're through with him. He has already told you that he had heard all the questions and there is nothing that comes to his mind that leads him to believe that he wouldn't be a fair juror. Take the next juror.

R 797 *Examination by Mr. Shelton.*

Q. Mr. Sparrow, you have three children six, three and two and a half, is that right?

A. In thinking about that, I believe the younger child is a little younger. About two.

Q. I see. And have you or any member of your family or any one of your friends been the victim of any criminal act?

A. No, sir.

Q. You never have. Would you like to serve on this jury, Mr. Sparrow?

A. Yes, sir.

Q. Now, you served on a civil jury downtown, I believe you testified, didn't you? You said that?

A. No, sir.

Q. You never have?

R 798 A. No, sir.

Q. I see. Excuse me. Do you have any relatives that are policemen or any close friends that are policemen, Mr. Sparrow?

A. No, sir.

Q. Now, when you said that you would be free of any sympathy, you meant sympathy toward either side, of course, is that correct? Not only the State but Mr. Witherspoon and the defense as well, is that correct?

A. That's correct.

R 808 ALMA RUFF, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Shelton.

Q. Ma'am, would you give me your name, please?

A. Alma Ruff.

Q. How do you spell that?

A. A-l-m-a R-u-f-f.

Q. Is that Miss or Mrs.?

A. Mrs.

Q. Mrs. Ruff, where do you reside?

A. 5308 S. Lowe Avenue.

Q. With whom do you live at that address?

A. Myself.

R 809 You live alone?

A. Yes, sir.

Q. How long have you been living at 5308 S. Lowe?

A. Nine years.

Q. And where did you live previous to that?

A. 513 W. 32nd Street.

Q. You have lived in Chicago most of your life?

A. All my life.

Q. Did you go to school here in Chicago?

A. Yes, sir.

Q. What schools did you attend?

A. I attended Healy Elementary School.

Q. Are you employed?

A. Yes, sir.

Q. Where do you work, Mrs. Ruff?

A. International Chemical Company.

Q. Where are they located?

A. 3140 S. Canal Street.

Q. And what do you do there?

A. I work in the printing office. I work on a machine and do all general printing work.

Q. And how long have you worked for the International Chemical Company?

R 810 A. 41 years.

Q. That's a steady job, I would say. Mrs. Ruff, have you or any member of your family ever been the victim of any crime?

A. No, sir.

Q. Do you have any children?

A. Yes. I have one son.

Q. And how old is he, approximately?

A. He's 23.

Q. Is he employed?

A. Yes, sir.

Q. Where does he work?

A. Western Electric.

Q. Right here in Chicago?

A. Yes, sir.

Q. He worked for Western Electric—

A. When he came out of high school he went to work for Western Electric.

Q. I see. Do you have any close friends or relatives that are members of the Police Force?

A. On the Police Force?

Q. Yes.

A. Well, my daughter-in-law's brother-in-law was on the Police Force.

R 811 Q. I see. Have you ever had occasion to discuss police work with him there, any cases with him?

A. No.

Q. What did your husband do, Mrs. Ruff?

A. My husband was an electrician. My husband is in a mental institution.

Q. Have you had any previous jury duty?

A. No, sir.

Q. This is the first time you have ever been in a courtroom?

A. That's right.

Q. Would you like to serve on this jury?

A. Yes, I would.

R 814 *Examination by Mr. Kissane.*

Q. Mrs. Ruff, prior to your marriage, what was your name?

A. Minnich, M-i-n-n-i-c-h.

Q. How long did you live at 513 West 32nd Street?

A. Nine years.

Q. Have you lived on the south side of Chicago all your life?

A. Yes, sir.

Q. And you attended schools out there?

A. That's right.

Q. And you're working out there?

A. That's right.

Q. 41 years in one place of employment?

A. One place.

Q. Now, you heard Mr. Cernek yesterday mention that the person killed in this case is a police of-
R 815 ficer. You heard him say that, didn't you?

A. Yes, I have.

Q. Now, the fact that the deceased in this case is a policeman—does that in any way cause you to feel sympathetic in this matter?

A. No, sir.

Q. And does it cause you to feel prejudiced in any way?

A. No, sir.

Q. Would you allow sympathy or prejudice to affect your service here as a juror?

A. No, sir, I would not.

Q. You understand, do you, the only thing you're to consider in this case is what is testified to under oath and the rules of law as given by his Honor Judge Salter? Do you understand that?

A. Yes, sir.

Q. You're not permitted to permit sympathy or prejudice to come in and color your deliberations.

MR. CERNEK: I object to that question, your Honor.

THE COURT: Yes. That's the same question asked three times. That's not necessary, counsel. Proceed.

MR. KISSANE: I wasn't aware that there was
R 816 any rule that I couldn't ask them the same question.

THE COURT: Proceed, counsel. Proceed, now. I thought I made myself clear here that I'm trying to enforce Rule 26-1. Now, proceed. Ask any questions you want as to their background; but, as to these general questions, there is no need to rehash them over and over. These ladies and gentlemen have been here so they know all about it. They're way ahead of us. They understand what this case is all about. Find out from them. After you have inquired into their background, find out and assure yourself that they believe they can be a fair juror and go on to the next one.

MR. KISSANE: Q. You live at 5308 S. Lowe?

A. That's right.

Q. Now, your boy. Where does he live?

A. My son lives in the basement apartment.

Q. At the same place?

A. At the same place.

Q. That's the family home, is it?

A. Well, it belongs to my niece. And she lives in the middle flat and I live up above.

Q. I wasn't quite clear. You said the brother-in-law of a daughter-in-law is a policeman, is that right?

R 817 A. That's right.

Q. He's a Chicago policeman, is he?

A. Yes, sir.

Q. Did you recognize any of the names of the witnesses that were read here yesterday?

A. No, sir, I did not.

Q. Have you ever heard of this case before?

A. No, sir.

Q. And if you're selected as one of the twelve jurors and it should be your opinion, based on the evidence as you have heard it here testified to under oath and the rules of law given you by his Honor Judge Salter, that the defendant Witherspoon is guilty of the murder of Officer Stone, would you say so by signing a guilty verdict?

A. I would.

Q. Having arrived at that point in your deliberations, would you then proceed to fix a penalty that you and your fellow jurors deemed proper under the law and the evidence in this case?

A. Yes, sir.

Q. Now, if it should be your opinion, along with the other eleven jurors, and you're at that phase of your deliberations with reference to fixing the pen-
R 818 alty you deem proper in this case,—it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon should be given death in the chair, would you so say by signing a guilty verdict?

A. I would.

Q. Did anything come to your mind, when his Honor asked questions, Mr. Cernek, now Mr. Shelton

or myself,— did anything come to your mind, before you were asked questions, that indicated to you that you didn't want to serve in this case?

A. No, sir.

Q. So, as you sit there now, can you give the defendant and the State a fair and impartial trial?

A. Yes, I can.

Q. What schools did your boy attend?

A. He attended Healy Elementary School and Tilden High School.

Q. And then, from there, he went on to Western?

A. He went on to Western Electric.

R 891 FRED RACINE, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

Q. The gentleman who moved into the panel. Your name, sir?

A. Paul S.—

Q. Pardon me. The man in back of Mrs. Ruff.

A. Fred Racine.

Q. You spell your last name, sir?

A. R-a-c-i-n-e.

Q. And your home address?

A. 3634 S. 56th Court, Cicero.

Q. How long have you lived at that address?

R 892 A. Fourteen years.

Q. And with whom do you live at that address?

A. My wife and son.

Q. How old is the boy?

A. Fourteen.

Q. What is the nature of your employment, sir?

A. Tool and die maker.

Q. And by whom are you employed?

A. Western Electric.

Q. How long have you worked for Western?

A. 24 years and nine months.

Q. Prior to working for Western, where were you employed? Was it in the tool and die field? Has that been your work?

A. Yes, that was my work.

Q. And have you lived in and around Chicago all your life, sir?

A. Yes, sir.

Q. Where did you attend schools?

A. LaVergne Grammar School in Berwyn and Morton High School in Cicero.

Q. In addition to the family at home, do you have other members of your family, such as, brothers and sisters living in and around Chicago?

R 893 A. Yes, I have a brother living in Lemont and I have a sister living in Lyons. A sister and brother-in-law.

Q. Generally, what is the employment of your brother in Lemont?

A. A clerk for Western Electric.

Q. Now, have any of the questions asked of any of the preceding jurors brought anything to your

mind that indicated to you you cannot be a fair and impartial juror?

A. No.

Q. If you're selected as one of the twelve jurors, would you base your verdict in this case solely on what you hear testified to under oath from the witness stand and the rules of law as given by his Honor Judge Salter?

A. Yes, sir.

Q. You won't bring anything else into your deliberations, will you?

A. No, sir.

Q. Now, if it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of the murder of Officer Stone, would you so say by signing a guilty verdict?

A. I would.

R 894 Q. And having arrived at that, upon your deliberations, would you then fix a penalty that you and your fellow jurors deemed proper under the law and the evidence in this case?

A. I would.

Q. If it should be your opinion that death in the chair is a proper verdict in this case, would you say so by signing that type of a verdict?

A. I would.

Q. As you sit there now, can you give both sides a fair and impartial trial, sir?

A. Yes, sir.

R 896 *Examination by Mr. Shelton.*

Q. Mr. Racine, what is your occupation?

A. Tool and die maker.

Q. And have you had any prior jury experience, Mr. Racine?

A. Yes, sir. In the Circuit Court about 20 years ago.

Q. Was that a civil or a criminal case?

A. Civil.

Q. Other than that, that's the only time you have been in a courtroom?

A. No. I was in as a witness in an accident one time.

Q. For the plaintiff or the defendant?

A. The defendant.

Q. For a defendant?

A. Yes, sir.

Q. Is that the only time you have been in a courtroom— those times you just told me about?

A. That's right.

Q. Do you have a sister living in Lyons?

A. Yes, sir.

Q. What does her husband do?

A. Her husband is an accountant for Western Electric.

R 897 Q. Is your sister employed, Mr. Racine?

A. No, sir.

Q. Now, you don't have any quarrel with the law about the burden of proof that's required in a criminal case, do you, Mr. Racine?

A. No, sir.

Q. You understand what it is?

A. Yes, sir.

Q. It's different than in a civil case. The State must prove beyond a reasonable doubt the defendant's guilt?

A. That's right.

Q. And, after hearing all the evidence and hearing the charge by the court, if you retire to the jury room for a verdict and you feel and it's your opinion that the defendant is not guilty, you won't hesitate in returning a not guilty verdict, will you?

A. That's right.

Q. In other words, you will give sides, not only the State but both sides, a fair trial?

A. Yes, sir.

Q. And the fact that there may be police officers testifying here, that in itself won't cut any ice with you, as far as credibility is concerned, will it?

R 898 A. No, sir.

Q. You will use your own rules for judging the same as any other person?

A. Yes, sir.

Q. Now, if the State, Mr. Racine, shows that the defendant has a prior conviction, that fact in itself won't prejudice you one way or another, will it? In other words, you will make up your mind from the basis of the evidence as you hear it from the witness stand?

A. That's right.

Q. Anything that's happened in the past you won't consider?

A. No, sir.

MR. SHELTON: Thank you, Mr. Racine. You sit there.

R 906 ALBERT KLEIN, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Shelton.

Q. May I have your name, sir, the gentleman that is sitting behind Mrs. Ruff?

A. Albert Klein.

R 907 Q. K-l-e-i-n?

A. K-l-e-i-n.

Pardon me, before we proceed with all the questioning, I'd like to know the first name of the officer that—

Q. Mitchell Stone.

A. Mitchell. There was a Stone that I did know, which I don't know if he was a policeman or not, that we went to school with, and I wasn't sure that that was the one. I heard he was an officer but I didn't know for sure who that was. This is school chums, way, way back.

Q. I see. Now, the fact, Mr. Klein, that you had a school chum that later became an officer, would that prejudice your thinking at all in any way?

A. I believe it would prejudice me if I know it was this particular person.

THE COURT: You're satisfied, though, now that it's not the same person?

A. Yes, sir.

THE COURT: All right, proceed, gentlemen.

MR. SHELTON: Q. Mr. Klein, where do you reside?

A. At 2000—74th Avenue, Elmwood Park.

Q. Elmwood Park?

R 908 A. Yes, sir.

Q. How long have you lived there, Mr. Klein?

A. A little over six years.

Q. And where did you reside before that, Mr. Klein?

A. 3828 W. Gladys Avenue, Chicago.

Q. 3828?

A. West Gladys.

Q. You have lived in Chicago or this area most of your life, Mr. Klein?

A. Yes, sir.

Q. Who lives with you at your home in Elmwood Park?

A. My wife and two children.

Q. How old are the children, Mr. Klein?

A. 13 and 12.

Q. Did you go to school here in Chicago?

A. Yes, sir.

Q. What schools did you attend?

A. St. Thomas Aquinas and John Marshall and Carl Schurz, I went to, also.

Q. And what do you do for a living, sir?

A. Plant engineer.

Q. And where are you employed?

R 909 A. Apex Bolt Product Company, 452 N. Claremont.

Q. How long have you worked there?

A. 13 years.

Q. And previous to that?

A. Haber Screw Company.

Q. And what is the nature of your work at Apex Bolt? Exactly what do you do there?

A. Well, it's trouble shooting on machinery, making sure that production is moving and correcting the fault and deficiencies in the machinery.

Q. Is your wife employed, Mrs. Klein?

A. Yes, she is.

Q. Where does she work?

A. The YMCA.

Q. What is the nature of her job?

A. She's a part time office worker there.

Q. How long has she worked there?

A. About five years.

Q. Do you have any brothers or sisters or any of the family living in this immediate vicinity?

A. One brother.

Q. What does he do?

A. He's a machinist.

Q. Where does he work, Mr. Klein?

R 910 A. Signode Steel Strapping Company.

Q. Was your wife from this area?

A. Yes.

Q. Have you ever served as a juror before, Mr. Klein?

A. No, sir.

Q. Is this your first time in the courtroom?

A. Yes, sir.

Q. I see. You never appeared as a witness or anything?

A. No, sir.

Q. Now, do you have any quarrel with that portion of the law which requires the State to prove its case beyond a reasonable doubt?

A. Would I have any quarrel?

Q. Yes. In other words, do you agree with that principle of law? In other words, in a civil case the plaintiff bears the burden of proving the case with a preponderance of evidence.

MR. KISSANE: I'm going to object. Under this 24-1, it's the strict province of the court to instruct on matters of law and not the examining counsel.

MR. SHELTON: I'm just asking him—

MR. KISSANE: I'm making an objection to the
R 911 court, that's all.

THE COURT: If I had been adhering strictly to the rules, we'd have had this jury picked yesterday afternoon. I'll allow the question. The jury will understand that the law will be given to you by the court.

PROSPECTIVE JUROR KLEIN: I understand that.

THE COURT: Proceed.

MR. SHELTON: Q. And you'll require the State to prove their case beyond any reasonable doubt?

A. Yes, sir.

Q. Now, Mr. Klein, is there any member of your immediate family or any one of your close friends who happens to be a policeman?

A. No, sir.

Q. The fact that policemen might testify in this case won't cloud your reasoning in any way and you'll require them to be put to the same tests for credibility as any other witness, is that right?

A. That's right.

MR. SHELTON: Thank you, Mr. Klein. We'll tender the panel, Mr. Kissane.

No, stay. Thank you.

THE COURT: All right.

R 912 *Examination by Mr. Kissane.*

Q. Mr. Klein, prior to living in Elmwood Park, you lived at 3828 Gladys, is that correct?

A. Yes, sir.

Q. Then, before that, you went to Schurz High School so you must have lived over northwest?

A. That was just evening classes.

Q. Your family consists of you and your brother, is that correct?

A. Well, I have two brothers.

Q. You mentioned one is a machinist for Signode. Is there another brother?

A. There's one in Colorado.

Q. I'm sorry. The other brother— what does he do?

A. Well, I don't hear from him very often. The last I heard he was driving a taxicab but he's a tool and die maker.

Q. Did you say he was in Colorado?

A. Yes.

Q. Now, did any of the questions asked of any of
R 913 the preceding jurors bring anything to your mind that would affect your service here as a juror?

A. No, sir.

Q. Which Y does your wife work in as a clerk?

A. Montclair-Leyden.

Q. Is that on Grand Avenue?

A. Yes, on Grand.

Q. If you're one of the twelve jurors and you have heard all the evidence and it's your opinion, along with the other eleven, that the defendant Witherspoon murdered Officer Stone and that the proper verdict is that of death in the chair, would you so say by signing a guilty verdict and fixing that type penalty?

A. Yes.

Q. You won't allow sympathy or prejudice in any way to color your deliberations as a juror, is that correct?

A. That's correct.

Q. Do you know any reason why you cannot be a fair and impartial juror?

A. No, I don't.

Q. How long have you lived at that address in Elmwood Park? I didn't get that.

R 914 A. A little over six years.

Q. And how long would that be at 3828 Gladys?

A. Two years.

MR. KISSANE: The State will accept the second panel.

THE COURT: All right, let the record show that the second panel of four has been accepted by both sides.

R 948 JOHN HAYES, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Wallace.

Q. Now, the first gentleman here in the gray suit. Will you tell us your name, please?

A. John Hayes.

Q. What is that last name?

A. Hayes.

Q. H-a-y-e-s?

A. Yes.

Q. Where do you live, Mr. Hayes?

A. At 6443 West 93rd Street, Oak Lawn.

Q. How long have you lived at that address?

A. Seven years.

Q. Are you married, Mr. Hayes?

A. Yes, sir.

Q. And do you have children?

A. Yes, sir.

R 949 Q. How many children do you have?

A. Two.

Q. And how old are they?

A. The girl is nine and the boy is six.

Q. Mr. Hayes, by whom are you employed?

A. Corn Products Company.

Q. What do you do at Corn Products?

A. I'm superintendent of the Printing Division.

Q. How long have you been with that organization?

A. Fifteen years.

Q. Now, Mr. Hayes, both of your children are of school age, is that right?

A. One is in kindergarten.

Q. And what grade is the other in?

A. Third.

Q. You have been sitting here for some time yesterday and heard the general questions that were being asked by the State's Attorney and by the attorneys for the defense?

A. Yes, sir.

Q. Now, is there anything that you heard during that questioning that might prejudice you in any way or might give you any preconceived ideas about this matter?

R 950 A. No, sir.

Q. Now, Mr. Hayes, do you have brothers and sisters?

A. No, sir.

Q. Do you have any friends or relatives who are on any Police Department?

A. No, sir.

Q. Do you think, Mr. Hayes, that you could, if you are selected as a juror, give both sides a fair and impartial trial?

A. Yes, sir.

Q. And that would be your intention, I presume?

A. Yes, sir.

Q. You, of course, realize, Mr. Hayes, that this matter of a trial starts out, in the first instance, by indictment?

A. Yes, sir.

Q. But you also understand that the indictment is nothing other than the process of starting the litigation and it doesn't give a presumption of anything against the defendant, is that right?

A. That's right.

Q. In other words, you understand that the defendant is presumed innocent until proven guilty?

A. Yes, sir.

R 951 Q. And that the State has the burden of proving that guilt?

A. Yes, sir.

Q. And they must do that beyond a reasonable doubt?

A. Yes, sir.

Q. Now, have you ever sat in any other court as a juror or as a witness, Mr. Hayes?

A. No, sir. I was a complainant in a Magistrate case about four years ago.

Q. What type of case was that, Mr. Hayes?

A. Well, there was a man in the neighborhood who had been shooting a rifle in a heavily populated area and I happened to see him and I signed a complaint.

THE COURT: There's one of those in every neighborhood.

THE PROSPECTIVE JUROR: We don't have this one any more, your Honor.

MR. WALLACE: Q. Well, was he a so-called hunter or was he just, as we describe him, a little—

A. Every time a dog would get in his yard he'd shoot him. I don't own a dog but I was worried about the bullets richocheting. That's the only time I have ever been in court.

Q. Now, Mr. Hayes, do you think that experience
R 952 might cause you to be prejudiced in any manner, shape or form against the defendant, Mr. Witherspoon?

A. No, sir.

Q. What you're telling us, then, is that this is quite a different situation?

A. Oh, yes, sir.

Q. Now, Mr. Hayes, you, of course, realize that Mr. Witherspoon has a very vital interest in this case?

A. Yes, sir.

Q. Would you take his testimony the same as you would take the testimony of any witnesses that the State might offer in this matter?

A. Yes, sir.

Q. Would you accept his testimony as given from the witness stand in the same light as the State might offer?

A. Yes, sir.

Q. Now, if the question of a past criminal record of the defendant were to arise, would that disturb you, Mr. Hayes, in this case before us?

A. No.

Q. Do you then think that you would be able to go straight down the middle until you had heard
R 953 both sides of this case?

A. Yes, sir.

Q. And that when you went to the jury room you would deliberate in your particular fashion and make your own particular decision?

A. Yes, sir.

MR. KISSANE: I object to that— his own particular fashion. He has to deliberate, based on the evidence as he heard it and the rules of law as given by your Honor.

THE COURT: That's understood, of course.

MR. KISSANE: If that's what's understood by "your own particular fashion," I have no objection. But it's what he heard here and the rules of law given by your Honor, not his own particular fashion.

MR. WALLACE: Well, Mr. Hayes, you would make your own decision on the evidence that you hear from the witness stand and the law as given by his Honor Judge Salter?

A. Yes, sir.

Q. Do you feel that you would like to sit on this jury?

THE COURT: I think, counsel, that question has been asked several times during the trial and I

R 954 haven't said anything about it. Of course, all these jurors want to serve. But to say they would like to sit on a particular case is rather confusing. You mean this particular case.

Q. Is there any reason why you feel you shouldn't sit on this case?

A. There is no reason why I feel that I shouldn't, but there is no reason why I particularly want to sit on this case, either.

MR. WALLACE: Q. I see. But if you do sit, you can give both sides a fair trial, is that right?

A. I believe I can, yes, sir.

MR. WALLACE: Thank you, Mr. Hayes.

R 975 *Examination by Mr. Kissane.*

Q. Mr. Hayes, as I understand it, you live seven years in Oak Lawn on 6443— Is that 93rd Street?

A. Yes, sir.

Q. And prior to that, where did you reside?

A. 7813—66th Street, Bedford Park.

Q. Have you lived in the southwest part of the county all your life?

A. Yes, sir.

Q. And where did you attend schools?

A. I attended Walsh and Graves Elementary schools in Argo-Summit, Argo Community High School and DePaul University.

Q. At DePaul, what particular one of the university schools were you in? What did you major in?

A. I majored in management.

Q. Business management?

A. Yes, sir.

Q. You were in the Commerce School?

A. I was in the Commerce School.

R 976 Q. And then, from there, you went to work at Corn Products, is that right?

A. I'd been working at Corn Products prior to that.

Q. You went to DePaul nights, is that it?

A. No, sir. But I maintained my seniority working weekends, vacations and holidays. There was always work down there at that time.

Q. You have now been there fifteen years.

A. Yes, sir.

Q. I couldn't quite hear that. You're an assistant superintendent, is that right?

A. Yes, sir. Of the Printing Division.

Q. And that's where you are now?

A. Yes, sir.

Q. Other than this one experience in a J.P. court involving the firing of the rifle in the town limits, that's the only time you had ever been in a courtroom, is that correct?

A. Yes, sir.

Q. And, with reference to this building, the first time you were ever here was Monday of this week, is that correct?

A. Yes, sir.

R 977 Q. Now, do you understand, as a juror, you're to base your verdict solely on what you hear testified to from the witness stand under oath?

A. Yes, sir.

Q. And, as to the rule of law, the rule of law you're to follow are the rules of law as given by his Honor Judge Salter. Do you understand that?

A. Yes, sir.

Q. And would you bring into your deliberations as a juror something that didn't develop on the witness stand and incorporate it into the rule that you thought was the rule of law rather than Judge Salter's rule?

A. No, sir.

Q. Similarly, would you allow sympathy or prejudice in any way to color your deliberations here as a juror?

A. No, sir.

Q. And, in listening to the testimony as it develops here in the courtroom, you'd use your native common sense or horse sense, in evaluating the credibility or truthfulness of witnesses, is that correct?

A. Yes, sir.

R 978 Q. Now, if you're selected as one of the twelve jurors, would you base your verdict in this case solely on what you hear testified to on the witness stand and the rule of law as given by His Honor Judge Salter?

A. Yes, sir.

Q. Now, should it be your opinion, along with the other eleven jurors, based on the evidence as you have heard it and the rule of law as given by His Honor, that death in the chair is a proper verdict in this case, based on the law and the evidence as you have heard it here, would you so say by signing a verdict fixing the penalty at death in the chair?

A. Yes, sir.

Q. If you had any reservations in your mind, you'd tell us at this time, is that correct?

A. Yes, sir.

Q. Now, you came in here— Would it be yesterday or Monday?

A. Yesterday before noon.

Q. Before the noon recess?

A. Yes, sir.

Q. And as questions were asked by his Honor and the various attorneys, of the preceding jurors, did anything come to Mr. Hayes' mind that indicated to him that he couldn't be fair and impartial?

A. No, sir.

R 989 Q. As you sit there now, knowing your past experience in life, does anything come to your mind that would affect your service here as a juror?

A. No, sir.

Q. Do you know of any reason why you cannot be a fair and impartial juror?

A. No, sir.

Q. Now, I didn't hear counsel ask you: Do you have any brothers or sisters or are your parents still living in and around Chicago?

A. I have no brothers or sisters. My parents are both living in Bedford Park.

Q. In General, what has been the employment of your father?

A. He's a mechanic for Corn Products Company.

R 964 PAUL GRADY, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Wallace.

Q. Now, sir, will you tell us your name?

A. Paul Grady.

Q. That last name.

A. G-r-a-d-y.

Q. Where do you live, Mr. Grady?

A. 1910 S. 5th Avenue, Maywood.

Q. How long have you lived there?

A. In this particular location, four years. About seventeen years altogether.

Q. In that area?

A. Yes, sir. About a couple of blocks from there.

Q. Are you married, Mr. Grady?

A. Yes, sir.

Q. Do you have children?

A. I have two, 19 and 17.

Q. And are they boys or girls?

A. Both boys.

Q. Now, what do these boys do, Mr. Grady?

A. The 19 year old boy is in college and the 17
R 965 year old boy is in high school.

Q. What college does the 19 year old go to?

A. Illinois Wesleyan at Bloomington.

Q. And what year is he in?

A. Sophomore.

Q. Now, Mr. Grady, by whom are you employed?

A. A. J. Heinz Company, 57 varities.

Q. 57 varities, sir?

A. Yes, sir.

Q. What office are you in?

A. I'm out of the Chicago office, 4141 West Chicago Avenue.

Q. How long have you been with that organization?

A. Twenty-four years.

Q. What is your position there?

A. Salesman.

Q. That's outside salesman?

A. That's right. I have a couple of headquarters accounts and I have some work at the store level, too.

Q. Mr. Grady, do you have brothers and sisters?

A. Yes, sir. I have three sisters and one brother.

Q. And those sisters. Do they live in Chicago?

A. No, sir. Two of them are in New York and one is in California.

R 966 Q. Are they married?

A. Yes, sir.

Q. What do their husbands do?

A. The two in New York for the State of New York and the one in California for Graumann Aircraft. He's a sort of a trouble shooter for them.

Q. The one that works for the State of New York. What does he do?

A. I think one is with the Highway Division and the other one, I think, worked for one of the mental instutions there in some capacity. I think there are

two or three in there but I forget which one he's associated with. Something like a matron only the male end of it, see?

Q. Now, has anything that has transpired here, as you have been sitting here, in the way of conversation or questions or answers,—has anything like that given you any preconceived ideas about anything in this trial, Mr. Grady?

A. No, sir.

Q. Do you feel that you can give the State and the defendant, Mr. Witherspoon, a fair trial?

A. Yes, sir.

Q. And if, after hearing the evidence from the wit-
R 967 ness stand and the law as given by his Honor Judge Salter, you feel that the State has not proven its case, then you would have no objection or no hesitancy in voting not guilty in this case, is that right?

A. That's right.

Q. And when you retire to the jury room, after hearing the witnesses and the instructions of his Honor, you'll make your decision and, of course, you realize that it has to be a concurrence of the 12 other jurors?

A. Yes, sir.

Q. As you sit there, Mr. Grady, is there anything you can think of that maybe we haven's covered that would prohibit you from sitting there as a fair and impartial juror?

A. Well, I don't say it would prohibit me from sitting here as a fair and impartial juror, but based on some of the other questions that you asked some of

the other prospective jurors, whether you have a friend that's a policeman, I do. There's a sergeant of police in Maywood a very good friend of the family.

Q. In Maywood?

R 968 A. Yes, sir.

Q. Do you think then, Mr. Grady, that that friendship might possibly cause an unevenness in your decision?

A. I don't think so.

Q. You don't think so?

A. No.

Q. Now, Mr. Grady, because, flatly, I believe you said you don't think that it would militate your friendship with this sergeant of police, can you say flatly that it wouldn't? This matter is so serious and Mr. Witherspoon is on trial here for his life.

A. No, I don't think it would.

MR. WALLACE: Thank you, Mr. Grady.

R 985 *Examination by Mr. Kissane.*

Q. Mr. Grady, prior to living at 1910 South 5th Avenue,—

Is that it?

A. Yes, sir.

Q. (Continuing) —you lived 17 years at other addresses in Maywood, is that right?

A. Right around the corner, yes, sir.

Q. And your employment has been that of a salesman for Heinz?

A. That's right.

Q. Has Heinz always had that location at 4141 West Chicago Avenue?

A. No, sir. When I started with them they were at, I think it was, 342 North Western, right next to the railroad tracks.

Q. Is this one of those new warehouses they built or an old one?

A. Right next to Hawthorne Melody.

Q. It's on the south side of the street there, is that right?

R 986 A. That's right.

Q. There just happened to be an old railroad yards there. They built these buildings there, is that where it is?

A. Yes, sir.

Q. Now, sir, prior to Monday of this week, had you ever been in a courtroom any where?

A. Well, about four years ago I was in the loop there in civil cases. I didn't serve as a juror.

Q. You mean you were there as a spectator?

A. I was there but I was called.

Q. You were called as a juror but you never sat in any particular type of case?

A. That's right. The only case I was called to involved a grocery store and, inasmuch as that was my business, I was excused.

Q. Now, other than that one experience when you were called as a juror in the civil court, you had never been in the courtroom before?

A. J. P. for failure to completely stop, so the officer said. I went through a stop sign.

Q. Other than those two experiences, had you ever been in a courtroom?

A. One other time on speeding. Just automobiles,
R 987 you know. In other words, in forty years of driving.

Q. Were they out in Maywood?

A. The one was in Maywood. The one I was talking about was in Maywood, the other was in Chicago.

Q. Is there anything about those two traffic situations that lingers on in your mind and would affect your service here in this jury trial?

A. No, sir.

Q. If there was something that you carried with you from those two incidents, you'd tell us, if it would, in your thinking, affect your service as a juror, is that correct?

A. Yes, sir.

Q. Because you understand now is the time to inform the court and the counsel that there is something in your mind that would affect your service here as a juror? Do you understand that?

A. Yes, sir.

Q. That's part of the reason why we ask these questions.

A. Yes, sir.

Q. And prior to Monday you had never been in this building before then?

A. No, sir.

R 988 Q. And if you're selected as one of the twelve jurors, in listening to the testimony, as it develops on

the witness stand, you understand that one of your functions would be to determine credibility, believability, that is, who you would believe. And, in determining that, you wouldn't completely disregard your normal common experience in life and your native intelligence, is that correct?

A. No, sir.

Q. You'd bring to your duties here as a juror your normal native intelligence and your common experience in life, in determining the credibility of witnesses, is that correct?

A. Yes, sir.

Q. And if you're selected as one of the twelve jurors, would you base your verdict solely, as to what the facts are, as to what you heard testified to from the witness stand under oath?

A. Yes, sir.

Q. You wouldn't bring into your deliberations, as to what the facts are, something that you thought might be the facts?

A. No, sir.

Q. And, similarly, as to the rule of law, would you
R 989 follow the rule of law as given by his Honor?

A. Yes, sir.

Q. His Honor will tell you what the law is that applies to a set of facts such as this at the end of all the evidence. Do you understand?

A. Yes, sir.

Q. And you wouldn't superimpose your thinking as to what the law is as contrasted as to what Judge Salter tells you is the law, would you?

A. No, sir.

R 1008 WAT T. CLUVERIUS, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Wallace.

Q. Will you tell us your name, please?

A. Wat T. Cluverius.

Q. How do you spell your last name, sir?

A. C-l-u-v-e-r-i-u-s.

Q. And you pronounce that how, sir?

A. Cluverius.

Q. Where do you live, Mr. Cluverius?

A. 10837 S. California Avenue, Chicago.

Q. Are you married, Mr. Cluverius?

A. Yes, sir.

R 1008 Q. Do you have children?

A. Both married.

Q. Girls or boys?

A. One girl and one boy.

Q. What does the boy do?

A. He's a lieutenant in the Naval Reserve now on the west coast.

Q. And is he a carreer man in the Navy, Mr. Cluverius?

A. No, I don't believe so.

Q. And the girl. Is she married?

A. Yes, sir. She lives in Park Forest. Her husband works for Standard Oil Company.

Q. Mr. Cluverius, by whom are you employed?

A. Moser Paper Company.

Q. And what do you do for that company?

A. I'm manager of the envelope manufacturing plant.

Q. How long have you been with that company?

A. Fourteen years.

Q. Mr. Cluverius, do you have any relatives or friends who are police officers?

A. Well, there was a man who worked under me who is now on the Police Force.

Q. What Police Force is that?

A. The Chicago Police Force.

R 1010 Q. How long did he work under you, Mr. Cluverius?

A. Oh, six or seven years.

Q. Mr. Cluverius, do you think the fact that he worked under you and for you would cause you to be prejudiced in this case, since a police officer is involved?

A. No, I don't believe so.

Q. Now, you say you don't believe so, Mr. Cluverius. Would you state that categorically?

A. I'd say no.

Q. Now, have you been here since Monday Mr. Cluverius?

A. No, since yesterday.

Q. You have heard the list of witnesses read by his Honor Judge Salter. Did you recognize any of those names?

A. No, I did not.

Q. Now, do you know any of the counsel here?

A. No, I do not.

Q. For the defendant.

A. No.

Q. You realize, of course, that the defendant starts out, the defendant, Mr. Witherspoon, starts out, with the presumption of innocence?

R 1011 A. I do.

Q. Does that law sound fair to you, Mr. Cluverius?

A. Yes, sir.

Q. And, after you have heard the testimony of the witnesses from the stand and the law from his Honor Judge Salter, do you feel that you could then retire to the jury room and give a fair decision to the State and to the defendant, Mr. Witherspoon?

A. Yes, I do.

Q. Have you ever sat on a jury before, Mr. Cluverius?

A. No, I have not.

Q. Have you ever been in this building before?

A. No, not until Monday.

Q. Have you ever been engaged in any type of litigation at all?

A. No, sir.

Q. Or complaints or anything like that?

A. No, sir.

Q. Now, you realize, of course, that the State must prove its case beyond a reasonable doubt?

A. I do.

Q. And the court will so instruct you. And if the court instructs you on that law, you have no quarrel with that law, do you Mr. Cluverius?

R 1012 A. No, I do not.

Q. You have heard the many questions and answers that have been bandied around yesterday and today from the various jurors and attorneys. Is there anything that strikes your mind or here has struck your mind during that time which would lead you off with any preconceived ideas?

A. No, I don't believe so.

Q. Now, if the fact exists that Mr. Witherspoon has a prior criminal record, would that prejudice you in this particular case?

A. No, sir.

Q. And, of course, you realize that Mr. Witherspoon has a very vital interest in this case?

A. Yes, I do.

Q. And would his testimony be accepted in the true light, as well as the testimony that the State's witnesses may have?

A. Yes, sir.

Q. You feel then, Mr. Cluverius, that you could give, upon hearing the evidence and the rules of law by his Honor Judge Salter, a fair and impartial trial to both sides?

A. Yes, sir.

R 1013 Q. And you would make the State prove its case beyond a reasonable doubt?

A. Yes, sir.

Q. Mr. Cluverius, have you heard anything about this case before?

A. No, sir, I have not.

Examination by Mr. Kissane.

Q. You pronounce your name, sir, Cluverius?

A. Yes, sir.

Q. Prior to living at 10837 S. California—

Do you live across from the cemetery or the Ridge Country Club there?

A. From the cemetery.

Q. How long have you lived at that address?

A. 14 years.

Q. And prior to living at this address, where did you reside?

A. Well, mostly on the east coast, around Boston.

Q. Around where?

A. Boston.

R 1014 Q. You attended schools in Boston, then, is that it?

A. No. I attended the Naval Academy in Annapolis for two years and then various high schools up and down the east coast.

Q. When did you graduate from the Academy?

A. I didn't graduate. I was there two years.

Q. Well, originally, then, you lived in Boston and then came to Chicago?

A. Well, after serving in the Naval Reserve during the war, yes.

Q. Where did you attend grammar school and high school?

A. There were about seven or eight grammar schools and two or three high schools.

Q. Where would that be, sir?

A. Annapolis, Maryland, Washington, D. C., and Philadelphia, New York, Boston,—

THE COURT: That's enough.

MR. KISSANE: Q. You're part of a Navy family, is that it?

A. Yes, sir. My father was also in the Navy.

Q. And, prior to Monday of this week, had you ever had occasion to be in a courtroom anywhere, sir?

R 1015 A. No, sir.

Q. And, since you came out here Monday, did you ever come into any courtroom other than his Honor Judge Salter's?

A. I went downtown and was in Judge Tucker's courtroom.

Q. Judge Tucker's?

A. Yes, sir.

Q. Did you go to the jury box there?

A. Yes, I was. I was excused there.

Q. Now, your boy is in the Navy and your son-in-law works for Standard Oil?

A. Yes, sir.

Q. With reference to other than your father and you, did you have other and brothers and sisters in your family? What I'm getting at is this: The next question would be: In general, what is their work?

A. All in the Navy, sir.

Q. Now, you understand, and counsel talked to you, about the presumption of innocence and reasonable doubt?

A. Yes, sir.

Q. And you understand that these two presumptions are presumptions that are given to all defend-
R 1016 ants in all criminal cases. You understand that, don't you?

A. Yes, sir.

Q. That's part of our regular, normal legal procedure under our Constitutions. You understand that, don't you?

A. Yes, sir.

Q. And, sir, if you are selected as one of the twelve jurors in this case, would you base your verdict in this case solely on what you hear testified to from the witness stand and the rule of law as given by his Honor Judge Salter?

A. Yes, sir.

Q. And, from your past experience in life or your reading or the movies or the TV, you wouldn't bring into your deliberations as a juror something that you, Mr. Cluverius, thought should be the law, would you?

A. No, sir.

Q. And, when you sat here yesterday and today, did anything come to your mind that indicated to you you could not be fair and impartial in this case?

A. No, sir.

Q. Now, you understan from what has been said
R 1017 here in the last few days that you were aware that the charge in this case is that of murder, don't you?

A. I do.

Q. And the deceased in this case was a police officer?

A. I do.

Q. And is there anything about the charge in this case that would start you out feeling sympathetic or prejudiced one way or the other in this case?

A. No, sir, I don't believe so.

Q. Now, sir, if, after having heard all the evidence and his Honor instructs you and you and the eleven jurors retire to the jury room and proceed to deliberate to a verdict and it should be your your opinion and the other eleven, that the defendant Witherspoon is guilty of the murder of Officer Stone, would you so say by signing a guilty verdict?

A. Yes.

Q. Now, having arrived at that point in your deliberations as a juror, do you understand that you have the additional duty of fixing a penalty that you and your fellow jurors deem proper under the law and the evidence in this case? You understand that,
R 1018 don't you?

A. Yes, sir, I do.

Q. Now, at that phase of the deliberations as a juror, if it should be your opinion, along with the other eleven jurors, that this is a proper case for fixing the penalty at death in the chair for the defendant Witherspoon, for the murder of Officer Stone, would you so say by signing a guilty verdict and fixing death in the chair as the penalty?

A. Yes, I would.

Q. So, as you sit there now, do you feel you can give the defendant and the State a fair and impartial trial?

A. I would think so.

Q. As you have heard these other gentlemen, when people always qualify something, we have to ask the next question: Are you sure?

A. I'm sure.

Q. You said, "I think so." In normal talk, people say "I think so," and so on. But when we talk, and the various counsel, you heard them say, "You're sure?" That's the same question I have to ask you, when you say, "I think so." Is there any hesitation in your mind, sir?

R 1019 A. No.

Q. And you understand that the only way we can evaluate or you can evaluate your function as a juror is by your answers, so I hope you won't think I'm unduly asking too many questions.

A. No, not at all.

Q. Because it's not designed to do anything other than elicit information.

A. There is one thing I would like to state, though, and that is that I am personally acquainted with a gentleman in the State's Attorney's office.

Q. Who is that?

A. Mr. Sandquist. I don't feel that that would particularly influence me.

Q. Would that in any way affect your service here as a juror?

A. No, it would not.

R 1022 NED CALDERONE, called as a prospective juror, being first duly sworn, was examined as follows:

THE COURT: Q. Now, this last juror that's been called up. You have heard all the questions?

A. Yes, sir.

Q. Do you know any of the parties?

A. No, sir.

Q. Do you know any of the witnesses?

A. No, sir.

Q. Do you know anyone in the State's Attorney's office?

A. No, sir.

Q. Do you have any policemen that are your friends?

A. Policemen, yes.

Q. You know a policeman?

A. Neighbors in Chicago.

Q. Do you feel that that would affect your being a fair and impartial juror in this case?

R 1023 A. No, sir.

Q. Do you know of any reason why, if you're selected as a juror, you couldn't be a fair and impartial juror?

A. No, sir.

Q. You have heard all these questions that have been asked since early yesterday. Has anything come up, in the questioning of these other jurors, that should lead you to believe that you shouldn't sit as a juror is this case?

A. The only question I got, I've been in the Criminal Court Building here as a juror before in the Circuit Court.

Q. Did that prejudice you?

A. They asked that question, so I thought I'd bring it up.

Q. What's that?

A. They keep asking, "Have you ever served before?" and I thought I would bring it up.

Q. Is there anything in that service that would prejudice you for or against either party?

A. No, sir.

THE COURT: Proceed, counsel.

R 1024 *Examination by Mr. Kissane.*

Q. Your name, sir?

A. Ned Calderone, C-a-l-d-e-r-o-n-e.

And your home address, sir?

A. 3820 Gladys, Bellwood, Illinois.

Q. With whom do you reside at that address?

A. My wife and two children.

Q. How old are the children?

A. 6 and 4.

Q. What is the nature of your employment?

A. I'm a mechanic for Commonwealth Edison Company in Maywood.

Q. How long have you worked for Commonwealth Edison?

A. Well, 14 years.

Q. Have you lived in and around Chicago all your life?

A. Yes.

Q. And what schools did you attend, sir?

A. Sumner grade school and Crane Tech High School.

Q. Prior to working for the Commonwealth Edison Company, in general, what type of work did you do?

A. I worked at a printing company, and then I went in the service and I put a year in at Chicago
R 1025 Rivet and then I went to Commonwealth Edison.

Q. Now, referring to your prior jury service here in the Criminal Court, do you carry anything over from that experience that would in any way affect your service here as a juror where the charge is murder against the defendant Witherspoon and the deceased is Mitchell Stone?

THE COURT: You don't need to answer that question. You've already answered it.

Ask the next question.

MR. KISSANE: Q. How long ago was it that you sat on a jury out here?

A. The two weeks I was on one case; and that week to the last day and the man pleaded guilty and the judge sentenced him. It was a robbery case.

Q. And then you were downtown on civil cases, were you?

A. Yes, sir.

Q. How long ago was that?

A. Oh, about four or five years ago. I'm not too sure.

Q. If you're selected as one of the twelve jurors, would you base your verdict solely on what you hear testified to from the witness stand under oath?

A. Yes, sir.

R 1026 Q. And would you follow the rules of law as given by the presiding judge?

A. Yes, sir.

Q. If you had any other thoughts along that line, you'd tell us at this time, is that correct, sir?

A. Yes, sir.

Q. Did you recognize any of the names of the witnesses that were read here by his Honor yesterday when you came in?

A. No, sir.

Q. Do you know any of the counsel at the table?

A. No.

Q. Have you ever heard of this case before?

A. No, sir.

Q. Now, if you're one of the twelve jurors and, after having heard all the evidence from the witness stand under oath and the rules of law as given by his Honor, you're back in the jury room and it should be your opinion, along with the other eleven jurors, that the defendant is guilty of the murder of Officer Stone, would you so say by signing a guilty verdict?

A. Yes, sir.

Q. Now, having arrived at that point in your deliberations as a juror, do you understand that you

R 1027 have the additional function of fixing a penalty that you and your fellow jurors deem proper under the law and the evidence in this case?

A. Yes, sir.

Q. You understand that, don't you?

A. Yes, sir.

Q. Now, at that phase of your deliberations as a juror, if it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of the murder of Officer Mitchell Stone and the proper penalty here is that of death in the chair, would you sign that type of a verdict?

A. Yes, sir.

Q. If you had any reservation, you'd tell us at this time, is that correct?

A. Yes, sir.

Q. So, having in mind your past experience in life, is there anything that indicates to you you cannot be fair and impartial?

A. No, sir.

Q. And did any of those questions asked of any of the preceding ladies and gentlemen yesterday bring anything to your mind, sir, that would indicate to you that you could not be a fair and impartial juror R 1028 in this case?

A. No.

A. No.

THE COURT: You don't need to answer that question. You have already answered it.

MR. KISSANE: I wasn't aware that he had answered it, Judge.

THE COURT: Yes. I asked the identical question.

MR. KISSANE: Q. So, as you sit there now, do you feel that you can give the defndant and the State a fair and impartial trial?

A. Yes, sir.

Q. Would you base your verdict solely on what you hear testified to under oath and the rules of law as given by the Judge?

A. Yes, sir.

Examination by Mr. Wallace.

Q. Mr. Calderone, you say, categorically, that your knowing these policemen in the neighborhood wouldn't affect your judgment here or prejudice you in any way?

R 1029 A. No.

Q. And that you could give the defendant and the State a fair trial, is that right?

A. Yes, sir.

Q. Now, is there anything else, Mr. Caldrone, during the entire time you have been sitting here, that recalls something to your mind or would in any way prejudice you from giving a fair shake to both sides?

A. None.

MR. WALLACE: The defense will accept the panel.

APPENDIX B.

THE DECISION TO IMPOSE THE DEATH PENALTY IN JURY TRIALS A STATE STATUTE*

Jury has discretion to impose the death penalty. The Court is bound by the jury's decision.

Ala. Code tit. 14, §318 (1958)
Ariz. Rev. Stat. Ann. §13-453 (1956)
Ark. Stat. Ann. §43-2153 (1947)
Cal. Penal §190.1 (1967 Supp.)
Colo. Rev. Stat. Ann. §40-2-3 (1963)
Conn. Gen. Stat. Rev. §53-10 (1967 Supp.)
(1) Fla. Stat. §919.23 (1965)
(1) Ga. Code Ann. §26-1005 (1953) (murder conviction not based solely on circumstantial evidence)
Idaho Code Ann. §18-4004 (1948)
Ind. Ann. Stat. §9-1819 (1956)
Kan. Stat. Ann. §21-403 (1964)
Ky. Rule Crim. Proc. 9.84 (1963)
(1) La. Code Crim. Proc., art 817 (1950)
Md. Ann. Code, art. 27, §413 (1967)
(1) Miss. Code Ann. §2217 (1942)
Mont. Rev. Codes Ann. §94-2505 (1947)
Neb. Rev. Stat. §28-401 (1964)
Nev. Rev. Stat. §200.030 (1961)
N.H. Rev. Stat. Ann. §585:4 (1955)
(1) N.J. Rev. Stat. §2A:113-4 (1937)
(1) N.M. Stat. Ann. §40A-2a-2 (1954)
N.Y. Penal §125.35 (1944)
(1) N.C. Gen. Stat. §14-17 (1943)
N.D. Cent. Code §12-06-05, 12-27-13 (1959)
(1) Ohio Rev. Code §2901.01 (1953)
Okla. Stat. tit. 21, §707 (1961)

Pa. Stat. tit. 18, §4701 (1936)
(1) S.C. Code Ann. §16-52 (1962)
Tenn. Code Ann. §39-2405 (1955)
Tex. Code Crim. Proc. art. 37.07 (1966)
Utah Code Ann. §76-30-4 (1953)
Va. Code Ann. §19.1-291 (1950)
(2) Wash. Rev. Code §9.48.040 (1961)
(1) Wyo. Stat. Ann. §6-54 (1957)
(1) D.C. Code Ann. §22-2404 (1961)

The trial court alone fixes the death penalty or refuses to impose it. The jury does not participate in that decision.

Md. Ann. Code art. 24-461 (1957) (rape), art. 27-338 (1957) aggravated kidnaping

The jury may impose the death penalty, with the trial court bound by a jury determination of death. But the court may also ignore a recommendation of mercy and impose death.

Del. Code Ann. tit. 11, §571 and 11, §623 (1953)
Mandatory death penalty.
Ariz. Rev. Stat. Ann. §13-701 (1956) (treason)
Mass. Gen. Laws, ch. 265, §2 (1932) (certain murders)
Miss. Code Ann. §2397 (1942) (treason)
R.I. Gen. Laws Ann. §11-23-2 (1956) (murder while under sentence for murder)

Jury has the discretion to impose the death penalty. However, the judge may overrule the jury and choose not to impose it. The judge may not impose death if the jury has decided against such a penalty.

Ill. Rev. Stat. ch. 38, §9-1 (1965)
Missouri State v. Anderson, 384 S.W. 2d 591 (1965)
S.D. Code §13.2012 (1939)

B. Federal Statutes

Jury has discretion to impose the death penalty. The Court is bound by the jury's decision.

18 U.S.C. 34 (1964) homicide in course of federal aircraft or motor vehicle statutory violation

18 U.S.C. 1111 (1964) murder in territorial or martime jurisdiction

18 U.S.C. 1114 (Supp. I. 1965) murder of a federal officer

18 U.S.C. 1201 (1964) certain kidnapings

18 U.S.C. 1992 (1964) homicide in course of violation of federal railroad statutes

18 U.S.C. 2113 (1964) homicide in course of federal bank robbery

18 U.S.C. 1751 (a) (Supp. I, 1965) slaying of a president, etc.

49 U.S.C. 1472 (i) (1964) aircraft piracy

Jury may recommend death, but the judge need not follow such a recommendation.

18 U.S.C. 2272, 2274, 2275, 2276 (1964) (see F. R. Crim. Proc. 32) certain atomic energy violations

18 U.S.C. 837 (1964) homicide in course of violation of explosives act

No provision as to imposition of penalty. F. R. Crim. P. 32 suggests that the judge makes the decision after a hearing in mitigation.

18 U.S.C. 794 (1964) certain war crimes

18 U.S.C. 2031 (1964) rape in maritime or territorial jurisdiction

18 U.S.C. 2381 (1964) treason

18 U.S.C. 1751 (a) (Supp. I, 1965) homicide in course of kidnaping president

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* Unless otherwise indicated, the cited provisions are applicable to the most culpable grade of homicide in the various jurisdictions.

(1) Death penalty unless the jury decides otherwise.

(2) Life imprisonment unless the jury decides the death penalty should be inflicted.

SUPREME COURT, U.S.

No. 1015

Office-Supreme Court, U.S.
FILED
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In the

Supreme Court of the United States

October Term, 1967

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

REPLY BRIEF OF AMICI CURIAE AMERICAN FRIENDS SERVICE COMMITTEE, COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST, GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH, THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY, UNION OF AMERICAN HEBREW CONGREGATIONS, CENTRAL CONFERENCE OF AMERICAN RABBIS and THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

REPLY BRIEF OF AMICI CURIAE AMERICAN FRIENDS SERVICE COMMITTEE, COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST, GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH, THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY, UNION OF AMERICAN HEBREW CONGREGATIONS, CENTRAL CONFERENCE OF AMERICAN RABBIS and THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM

Amici anticipate that the reply brief of petitioner will make appropriate response to the contentions of respondents and will comment on the very recent decision of the Fourth Circuit in *Crawford* v. *Bounds*. Accordingly we shall confine ourselves to the retroactivity question, as that issue may determine the life of hundreds.

I.

THE COURT'S RULING, IF FAVORABLE TO PETITIONER, SHOULD APPLY AT LEAST TO ALL PRESENTLY UNDER SENTENCE OF DEATH

These amici urge that this Court's ruling, if favorable to petitioner, should apply at least to all men presently under sentence of death and to Bumper, petitioner in the companion case, No. 1016. We think it would be inappropriate for these amici to express an opinion as to the further extent of retroactivity, e.g., to men tried before death qualified juries but not sentenced to death, those sentenced to death but who received commutation, etc. Bumper should receive the benefit because of the general rule that a litigant whose case serves as a vehicle for enunciation of a constitutional principle receives the benefit of the principle. *Stovall* v. *Denno*, 388 U.S. 293 (1967).

The question of retroactivity has at least three facets which perhaps have not been clearly separated in the three briefs which discuss the question:[1]

1. Should the ruling be made retroactive?

2. If it is made retroactive, who should obtain the benefits of retroactivity?

3. What relief should be granted to those entitled to such benefits?

Our views are as follows:

1 and 2. If this court rules in favor of Witherspoon and Bumper on the principal issue, it is unthinkable to us that the ruling would not apply retroactively, at least to all persons now under sentence of death. The LDF-NORI

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[1] LDF-NORI Br.85-93, Madden Br.29-33 (both favoring retroactivity) and briefs of amici attorneys general of California and other states (25-35) (opposed).

brief, pages 85-93, spells out in persuasive language the reasons for so holding.

The religious organizations now before this Court as amici desire particularly to urge this course. To take a human life with deliberation under any conditions is to us profoundly shocking, even where the legal proceedings pursuant to which life is taken are impeccable. But to take a life pursuant to a procedure declared by this Court to be unconstitutional is utterly abhorrent.

Perhaps because of these considerations, the briefs of respondents, the Attorney General of Illinois and the State's Attorney of Cook County are silent on the question of retroactivity although Illinois and Cook County both would be affected by a decision of this Court favoring retroactivity. Presently there are in Cook County 12 persons, and in all of Illinois 22 persons under sentence of death.

Prior holdings of this court on the retroactivity issue, we believe, light the path for decision here. Thus, where the new rule relates to the integrity of the truth seeking process itself, the rule has been given retrospective effect: so held this court concerning the right to counsel rule of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) and the coerced confession rule of *Jackson* v. *Denno,* 378 U.S. 368 (1964). See *Tehan* v. *Shott,* 382 U.S. 406, 416, (1966). Here we assert that the death qualified jury is an improper instrument for guilt determination. It thus goes to the heart of the truth seeking process. If this court holds that it is the punishment aspect of the trial only that is affected by such a jury, then we submit the imposition of the death sentence by an improperly constituted jury also justifies retroactivity. No one should perish whose case is essentially open to one who is saved.

The chief cases denying retroactivity fall on a different plane. Thus *Linkletter* v. *Walker*, 381 U.S. 618 (1965) declined to make retroactive the *Mapp* holding excluding evidence seized in violation of the search and seizure provisions of the Fourth Amendment. A basis for the decision perhaps was that the exclusionary rule itself was not designed essentially to benefit a defendant but to vindicate effectively the Fourth Amendment. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) declined retroactivity to the *Escobedo* and *Miranda* confession rules. There it may be that the enormous number of retrials, including many very old cases, was a decisive consideration. *Tehan* v. *Shott*, 382 U.S. 406 (1966) refused retroactivity to the rule forbidding prosecution comment on the failure of an accused to testify. *Stovall* v. *Denno*, 388 U.S. 293 (1967) had to do with the retroactivity of the rule concerning counsel at police line ups. Both *Tehan* and *Stovall* may rest essentially on the *Johnson* basis.

It is *Stovall* that sets forth standards. We submit that applying those standards here should result in retroactivity. As to (a), the purpose to be served by the new standard: we have argued above the purpose is to permit guilt-innocence and life or death punishment decisions to be made by a constitutionally selected jury. As to (b), the extent of reliance by law enforcement authorities on the old standards: it is essential to note that the principle question is an issue that arises *at trial*, not prior thereto. Hence there is no reliance in the sense of action taken or omitted by the authorities that render prosecution more difficult. ((cf. *Stovall and Linkletter*). A retrial under a constitutional procedure does not discomfit the authorities beyond the fact of the retrial itself.

As to (c), the effect on the administration of justice: this we discuss below in connection with the Attorneys General amicus brief.

We turn to the Attorneys General brief. We claim, retroactivity only for those presently under sentence of death (and Bumper), not for everyone tried before a death qualified jury. This suggestion, the Attorneys General find "utterly preposterous," (p. 32) claiming that if "the jury selection procedures attacked denied [the condemned] a fair trial on the issue of guilt, there is no rational basis whatever for differentiation as to retrospective application between those who did and those who did not receive the death penalty." To us the distinction seems the ultimate of rationality—it is the distinction between life and death.

The Attorneys General urge that a rule in favor of retroactivity would create chaos (pp. 29-32), estimating that approximately 8500 persons would be entitled to relief. We submit this is not a burdensome number for the country as a whole. For the reasons advanced above, however, we do not urge retroactivity for this full group but only for the 400 or so presently under death sentence. The most recent data available to us is that contained in the Bureau of Prisons, National Prisoner Statistics, Executions, 1930-1966. That report, states that as of December 31, 1966 there were 406 persons under sentence of death. The 406 cases were originally sentenced as follows:

CAPITAL CASES PENDING DECEMBER 31, 1966.
BY YEAR INITIALLY SENTENCED[1]

Year	Number	Cumulative Number	Cumulative Percentage
1966	111	111	27.34
1965	74	185	45.57
1964	63	248	61.08
1963	42	290	71.43
1962	33	323	79.56
1961	30	353	86.95
1960	28	381	93.84
1959	12	393	96.80
1958	2	395	97.29
1957	4	399	98.28
1956	4	403	99.26
1955	1	404	99.51
1954	-	404	99.51
1953	2	406	100.00
	Total 406		

[1] Source: National Prisoner Statistics, Executions, 1966, Figure D, p.4. We have added the cumulative number and percentage columns.

Thus we see that 111 or over 27% of the 406 cases pending on December 31, 1966 were sentenced that year, 290 or over 61% within the last three years and 323 or nearly 80% within the last 5 years. We mention five years because that is the age of the law jury cases now being tried in Cook County where this case originated. We are not suggesting it is desirable to try cases of that age, but only indicate that we do it daily. What we do routinely for these cases we can do as a matter of exception for these condemned men.

Thus there is no real burden of trying very old cases. True, the percentages for 1967 and 1968 may vary somewhat, but should not be too different. In any event, if we must decide between fundamental constitutional rights, between life itself, and administrative convenience, surely constitutional rights, and life should prevail. Far better that we incur inconvenience than that a single man should go wrongly to his death. Better that a few, perhaps guilty, escape death, or escape further punishment than that a single person die wrongly.

Moreover, a large percentage of these 406 cases (or current comparable number) will not remain as capital cases because of commutations, affirmances as to guilt with sentence reduced, affirmances as to guilt with remand as to penalty, reversals and remands, and reversals. Some may so have pleaded guilty or received bench trials and thus not be within the scope of the ruling. Hence the number requiring retrial because of a retroactive ruling here, will be substantially reduced.

A concluding observation: we suggest retroactivity for Bumper and the men presently under death sentence. This group is a well defined small group. The issue at bar relates specifically to capital cases and to these cases the benefit necessarily will be confined. True, in *Stovall* retroactivity was denied, but there the issue was of wide import and the case was only nominally a capital case because the Governor of New York had announced an intention to commute the sentence because New York had narrowed the scope of the death penalty. *Johnson* was a capital case, but there too the substantive issue was broad. If these differences are not distinctions, we ask that *Johnson* be modified to create a special rule for capital cases. It seems to us that capital cases do merit

special treatment here, just as they receive special treatment by statute (e.g. provision for automatic state court appeals, etc.).

Surely retroactivity should not depend on nice distinction between direct and collateral attack, between "final" an "non final" judgments, etc. We are deeply disturbed by the Attorney General's suggestion (Br. 34) that benefits be accorded Bumper but denied Witherspoon—on whatever basis, in light of the fact that *Bumper* is not a capital case and *Witherspoon* is.

Similarly we ask the Court to reject the Attorneys' General "harmless" error suggestion, Br.30,n3. It assumes perhaps erroneously that questions on scruples against the death penalty are proper. It assumes without basis that a prosecutor would elect to use up a peremptory challenge on every scrupled juror. Finally it necessarily assumes that the prosecutor would win the race to find 12 non-scrupled veniremen otherwise acceptable to him, and not removed for cause or peremptorily by the defense—before he ran out of peremptory challenges. Life and death issue should not be decided on such a cascade of assumptions.

Further, we think the retroactivity question, as to the group under sentence of death, at least, is ripe for decision and thus disagree with LDE-NORI Br. 79-85. There may be reasons for not extending retroactivity at this time beyond the group we have suggested, as the broader group is unknown as to number, age of cases etc. But surely these considerations are not relevant to the limited group we are concerned with. To forego a ruling would leave the matter utterly unsettled for an indefinite period. These condemned men should not be left to face the further agony of indecision on a question so vital to them.

3. The third question has to do with the relief that should be granted to pending capital defendants, assuming that the rule is to be made retroactive. It seems to us that the nature of the remedy depends in large measure upon the views that this Court takes as to the merits. If the Court is convinced, as we hope it will be, that the exclusion of scrupled jurors has an important impact, not only upon the determination of the penalty but also upon the guilt-innocence determination, then it seems to us that a new trial surely should be granted. If the court believes that the scrupled juror rule has a primary impact upon the determination of the penalty then it seems to us that some other relief (e.g., retrial of the penalty issue only) might be appropriate.

CONCLUSION

We respectfully urge the Court to hold that whatever new rule this Court announces on the merits should be retroactive for all men presently under sentence of death.

Respectfully submitted

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PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS,
Sheriff of Cook County, Illinois,
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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

(1)

The Decision of the Court of Appeals for The Fourth Circuit In Crawford v. Bounds Is Directly In Point and Correctly Decides the Issues Presented In This Cause.

On Thursday, April 11, 1968, after the filing of the briefs of both petitioner and respondent in this case, the United States Court of Appeals for the Fourth Circuit, sitting *en banc,* rendered its decision in *Crawford* v. *Bounds,* No. 10,981. That case, like the case at bar, arose on collateral attack of a state murder conviction and death sentence and involved issues identical to those presented by this case.

There, as here, petitioner charged that the exclusion for cause of jurors who expressed scruples against the death penalty violated his constitutional rights under the Sixth and Fourteenth Amendments. The Fourth Circuit reversed the denial of the petition for habeas corpus and remanded with instructions to issue the writ if the state fails to grant the petitioner a new trial, specifically holding (Op. pp. 22-23, App. A. p. 20)*:

> "... that belief against capital punishment on the part of jurors who are vested with a dichotomy of functions—the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed—cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws."

The decision in *Crawford* is so precisely in point and the majority opinion is so incisive in its reasoning that appellant has printed the full opinion as Appendix A to this brief.* It is appropriate, however, to summarize the

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* "Op." refers to the published slip opinion in *Crawford*. "App. A." refers to the Appendix to this reply brief which reproduces the *Crawford* opinion.

* All of the seven judges who participated concurred in the reversal. Of the seven, four concurred in the majority opinion of Judge Winter. Among them, Judge Sobeloff and Judge Craven wrote additional concurring opinions, Judge Sobeloff expressing his belief that the opinion should be grounded on due process as well as equal protection, and Judge Craven indicating he would

Court's analysis of a few of the major issues and arguments which have been presented in the instant case.

(a)

The crucial findings of fact which led the Court to its decision in *Crawford* were (i) jurors were excluded from the petitioner's jury, for "cause," solely because they expressed scruples against or opposition to the death penalty, without inquiry as to whether the scruple expressed would prevent the juror from being impartial *on the issue of innocence or guilt;* and (ii) the result of permitting the challenge for cause on this broad basis was to systematically exclude from the jury which would decide the guilt issue a substantial segment of the community.

With respect to the failure of the *voir dire* to establish that the disqualified jurors would not be impartial on the issue of guilt or innocence, the Court observed (Op. p. 6, App. A. pp. 5-6):

> "It is undisputed that members of the panel, from which the jury that convicted petitioner was chosen, were interrogated as to whether they had any sentiment or reservation against capital punishment; and any who expressed any such sentiment or reservation were, at the request of the prosecutor, immediately excused for cause without further inquiry. Thirty-four of seventy-five prospective jurors were disqualified on this broad ground. None of these thirty-four

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find a denial of the defendant's constitutional rights in the elimination of scrupled jurors even from the penalty fixing phase of a capital trial. The remaining three judges found it unnecessary to reach the constitutional issues discussed in the opinions of Judges Winter and Sobeloff; and one of them, Judge Bryant, indicated that he would disagree with the majority if he reached those issues.

was asked whether his scruples against capital punishment would interfere in any way in the determination of petitioner's guilt or innocence."

Virtually identical facts are present in the case at bar. Not a single prospective juror was questioned as to whether his or her opposition to the death penalty would affect his ability to be impartial on the innocence-guilt issue.

Basing its decision on the failure to establish a connection between the venireman's views on punishment and his fairness on the issue of innocence-guilt, the Court in *Crawford* found it unnecessary to reach the further question, raised in this case, of whether the inquiries on *voir dire* were sufficient to show that the views on capital punishment would prevent a fair consideration of the death penalty during the penalty fixing phase of the trial. As demonstrated in petitioner's opening brief and discussed in Part (5) of this reply brief, with but a few exceptions the *voir dire* in the case at bar was insufficient to establish that the veniremen would be unfair on the *penalty* question. Thus, on this aspect of the facts, the instant case is *a fortiori* from the *Crawford* case.

With respect to the substantiality of the exclusion resulting from the broad challenge allowed, the Court in *Crawford* observed that 45.33% of the panel was eliminated because of conscientious scruples against capital punishment, and noted that this percentage was "startlingly" close to the results of the 1966 Gallup Poll, which showed that 47% of those interviewed were opposed to capital punishment. (Op. pp. 6-7, fn. 4, p. 7; App. A. p. 6.) In the instant case, 49% of the jurors were excused for cause because of conscientious scruples against or opposition to capital punishment, without inquiring as to what effect, if any, their scruples would have on their ability to decide the guilt-innocence issue.

Thus, on both of the crucial issues of fact which form the basis for the *Crawford* decision, the record here is even stronger than the *Crawford* record.

(b)

The Court in *Crawford* fully recognized that in North Carolina, a long line of cases approved the exclusionary practice under attack, and that several federal cases likewise have directly or inferentially rejected petitioner's contentions. Every significant case in this area is cited and carefully analyzed in the *Crawford* opinion. Thus, to the extent applicable, the Court in *Crawford* considered and rejected virtually every case cited by respondents in the case at bar. The Court's analysis is contained on pages 8-9 and 15-21 of the memorandum opinion. (App. A., pp. 12 to 17.)

(c)

The Court in *Crawford* carefully considered and specifically rejected the assumption upon which respondents heavily rely in the instant case, to wit, that the exclusion of a prospective juror because of his scruples against the death penalty is reasonable where the crime could be punished by a range of penalties including death, because such scruples necessarily create the inference that the juror would not be impartial on the question of guilt or innocence. See *United States* v. *Puff*, 211 F.2d 171 (2nd Cir. 1954), cert. denied 347 U.S. 963. After discussing the *Puff* rationale at length (Op. pp. 15-19, App. A., pp. 12 to 17) the Court said (Op. p. 19, App. A. pp. 16-17):

> ". . . in *Puff* there was not recognition that what constitutes partiality of a juror on the issue of punishment does not necessarily constitute partiality of a juror on the issue of guilt, and *Puff* was not de-

cided on a record which developed the substantial systematic exclusion which, by virtue of prevailing community sentiment, inevitably results when jurors, disqualified as to the issue of punishment, are considered to be disqualified automatically as to the issue of guilt. *Puff* established the rule that when a sentencing procedure requires a jury to assess guilt and fix punishment in a single simultaneous verdict, necessarily, a juror, having bias as to punishment, is biased as to guilt. This thesis we reject; and as we later note, even if jury sentencing is established, there are alternatives to the single verdict system when the result thereof is to deny a constitutional right."

(d)

The Court in *Crawford* specifically considered and rejected the further argument that the wholesale and systematic exclusion of scrupled veniremen even though they constitute a substantial portion of the venire does not abridge the constitutional right to trial by a jury composed of a fair cross-section of the community because there is no showing that the "class" excluded would act as a class or have any identifiable common characteristics other than their views on the death penalty. This argument too is heavily relied upon by respondents in the instant case. In rejecting this argument, the Court of Appeals cites the cases in which this Court has condemned the systematic exclusion of a class of jurors, regardless of any showing of specific prejudice or identifiable common characteristics which would affect their impartiality, and applies the rationale of those opinions to the facts of the *Crawford* case and the case at bar.* The Court said (Op. pp. 27-29, App. A. pp. 24 to 27):

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* *Glasser* v. *United States,* 315 U.S. 60 (1942); *Ballard* v. *United States,* 329 U.S. 187 (1946); *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1946).

"North Carolina's practice of excluding persons from the jury selected to determine an accused's guilt or innocence, merely because they have some sentiment or reservation against capital punishment, without any determination that their beliefs would affect their ability to decide the issue of culpability, cannot stand under these Supreme Court decisions condemning systematic exclusion. . . . in the instant case 45.33% of the prospective jurors were disqualified on this ground. We do not know the color, or the sex, or the economic status of those who would be disqualified, or those remaining who would be considered qualified. We do not, and need not, know that in determining guilt or innocence they would act as a class. *Ballard* v. *United States, supra.* We know only that such a substantial percentage of the populace generally is different from the remaining populace in having a different basic concept of punishment in even the most heinous crimes which may stem, as pointed out in *Turberville* v. *United States, supra,* from divers and diverse reasons, from unshakable religious convictions to intellectual or philosophical distaste. Such a group would comprise a variety of views and a variety of approaches and, if allowed to serve, may well have a 'subtle interplay of influence' upon the others. *Ballard* v. *United States, supra,* p. 194. As a group it would seem as readily identifiable as the wage earners in *Thiel* v. *Southern Pacific Co., supra.*

• • •

". . . the *voir dire* inquiry should not cease after a determination that the prospective juror is opposed to capital punishment, but should further ascertain whether this opposition would preclude him from making a fair determination on the issue of guilt.

• • •

". . . if a prospective juror with conscientious objections can, in spite of these objections, make an impartial determination on the issue of guilt, his exclusion, if the class to which he belongs become sub-

> stantial, works to deny to the defendant his right to have his case judged by a jury representative of the community without serving any recognizable, legitimate interest of the state. . . . Under the equal protection clause, *voir dire* cannot be a blunt instrument of systematic exclusion of a widespread segment of the community whose views do not interfere with the interest which the state seeks to protect.''

In grounding its decision on the inherent denial of equal protection which results from the systematic and arbitrary exclusion of a substantial class of people from the jury, the majority in *Crawford* found it unnecessary to consider the further questions, which are raised here, of whether the exclusion of scrupled jurors operates to exclude disproportionate numbers of persons in certain other readily identifiable classes, such as Negroes, women, etc. (petitioner's opening brief pp. 17 to 20), or operates to leave an eligible venire which is partial to the prosecution on the issue of guilt or innocence (petitioner's opening brief, pp. 28 to 33). Judge Sobeloff, in his separate concurring opinion, discusses these additional issues, and on the basis of the scientific surveys cited in petitioner's opening brief adopts the position urged by petitioner here on these additional issues. (Sobeloff, J., Concurring Op. pp. 3-4, App. A. pp. 32 to 34).

(e)

The Court in *Crawford,* by condemning the practice of excluding scrupled jurors, without inquiring into the effect of their scruples on the innocence-guilt issue, avoids any possible claim that this case is not ripe for decision or that the scientific surveys presented are inadequate to support petitioner's arguments. Even amicus Legal Defense Fund

concedes that the limited issue decided in *Crawford* is ripe for decision in the case at bar.* (Brief p. 52.)

(f)

The Court expressly considers and rejects the proposition so vehemently urged by the respondents here, particularly the Sheriff, that the systematic exclusion of a substantial class of prospective jurors is somehow justified because the state has a legal right to impose death as one of the possible penalties for crime, and because under the single trial-double issue procedure adopted in Illinois (and North Carolina) the inclusion of scrupled jurors in capital cases may, as a practical matter, cut down the number of death penalties imposed or results in hung juries. Fully recognizing, for the sake of argument, both the alleged right to "have" a death penalty and the possible effect of the inclusion of scrupled jurors in capital cases under the dual issue trial system, the Court forcefully demonstrates that the existence of such a state created dilemma cannot excuse or justify the systematic exclusion of a substantial class of jurors on the guilt or innocence issue (Op. pp. 30-31, App. A pp. 28-29):

> "It is clear that the real interest which the state is seeking to protect by the *voir dire* practice followed in the instant case is the preservation of capital punishment, as one possible punishment, though not exclusive. This interest provides no firmer justification for the systematic exclusion of a substantial portion of the community from a jury determining the defen-

* The Court in *Crawford* also incisively answers any claims which might be made that the petitioner there, or here, would lack standing to complain of the exclusion of scrupled jurors in the absence of any showing that he was a member of the excluded class. See Opinion, p. 27a, App. A. pp. 24-25.

dant's guilt or innocence. Again, we do not question the legitimacy of this interest, and we do not doubt that permitting persons with conscientious objections to capital punishment to sit on a jury which is both to determine the guilt or innocence of the defendant and to impose his punishment in a capital case may result in some cases in effective nullification of the death penalty. . . . But, the state has *no* constitutional right to the imposition of capital punishment in any case; and a defendant *has* a constitutional protection against systematic exclusion. Moreover, the state's non-constitutional interest can be served by more narrow measures than the systematic exclusion of a large segment of the community from serving on a jury which is to determine the guilt or innocence of the defendant, and thus such exclusion cannot be deemed necessary to effectuate a valid state interest so as to save it under the equal protection clause." (Emphasis the Court's.)

(g)

The majority in *Crawford* found, implicitly in the primary opinion and expressly in the concurring opinion of Judge Sobeloff, that the systematic exclusion of scrupled jurors, where they represent a substantial portion of the venire and where no connection is shown between their views on the death penalty and their impartiality on the issue of guilt or innocence, is a constitutional defect which goes to the heart of the fact-finding process. Thus, the Court infers, if it does not hold, that its decision should be applied retroactively. As expressed by Judge Sobeloff, (Concurring Op. p. 2, App. A p. 32):

"'. . . These exclusions go to 'the very integrity of the fact-finding process' which depends on the presence of an impartial jury truly representative of a cross-section of the community. . . .'"

The inter quotation in Judge Sobeloff's opinion is from this Court's decision on retroactivity in *Linkletter* v. *Walker,* 381 U.S. 618-639 (1965). See the discussion in Part (14) below.

In conclusion, the decision in *Crawford* is directly in point with this case, both on its facts and its legal issues, and the opinion of the Court in that case incisively answers the arguments of respondent here. We respectfully submit that this Court should adopt the views expressed by the Fourth Circuit Court of Appeals in *Crawford.*

(2)

This Court's Recent Decision In United States v. Jackson Affords Additional Support To Petitioner's Contentions.

On April 8, 1968, this Court announced its decision in *United States* v. *Jackson,* 36 Law Week 4277. A majority of the Court held unconstitutional the provision of the Federal Kidnapping Act (18 U.S.C. §1201(a)) which provides that persons tried under that Act could be given the death penalty if but only if "the verdict of the jury shall so recommend." This Court affirmed the District Court's holding that this provision "makes 'the risk of death' the price for asserting the right to jury trial, and thereby 'impairs . . . free exercise of that constitutional right.'" (36 L.W. at 4278.) This Court said (36 L.W. at 4280-81):

> ". . . The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. [The provision] chill[s] the assertion of constitutional rights by penalizing those who assert them. . . ."

The very same kind of chilling effect on the exercise of constitutional rights was created through the operation

of Section 743 of the Illinois Criminal Code. That statute discouraged defendants indicted for murder from exercising their right to jury trial, because through the exclusion for cause procedure embodied in Section 743, the trial jury was stripped of all persons having "conscientious scruples against capital punishment, or [who were] opposed to the same." Cognizant of this statute and its effect upon the composition of the trial jury which ruled irrevocably on guilt or innocence and on the penalty, defendants would naturally be encouraged to have their cases heard at a bench trial—there was (and is) no authority to disqualify scrupled judges. When a jury trial was demanded, the defendant's fate on all issues was adjudged by a jury from which a substantial segment of the community had been excluded, leaving those who were biased in favor of the prosecution on the issue of defendant's innocence or guilt, and who would have no hesitation in voting to inflict the ultimate penalty in in the event of a finding of guilty.

Thus, Section 743 is invalid under the principles announced in *Jackson* as well as for the other reasons heretofore urged by petitioner.

(3)

Respondents Have Failed To Consider the Validity of Section 743 As Written.

It is significant that respondents have made no effort to discuss or support Section 743 as written. Here, as in a number of recent cases decided by this Court, fundamental constitutional rights may not be subjected to the threat of violation by vague and overbroad statutes, regardless of limiting interpretations.*

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* Cf. *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Winters* v. *New York,* 333 U.S. 507 (1948); *Wright* v. *Georgia,* 373 U.S. 284 (1963).

But there are no limiting interpretations of Section 743. That statute does not require any showing that the venireman's conscientious scruples against or opposition to capital punishment will or might have any effect whatever on his verdict. To put Section 743 into operation, it need only be shown that the venireman has scruples against or is opposed to capital punishment. Respondents and the Attorney General of California have not seen fit to comment upon this uncontrovertible language and effect of the statute here under consideration.

Because of its broad and unspecific contours, Section 743 sanctions and invites challenges for cause where in fact no cause or bias exists, and for this reason, as written as well as applied, it violates the Constitution.

(4)

The Voir Dire Examination of Mr. Salazar Did Not Avoid the Constitutiona' Violations Arising From the Wholesale and Systematic Disqualification Of Jurors At Petitioner's Trial.

The respondents rely heavily upon the proposition that the *voir dire* questioning of the first juror, Mr. Salazar, was extensive, and conclusively established that he would not vote for a death penalty in any case. From this, the respondent proceeds to argue that the questioning of Mr. Salazar was sufficient to avoid any constitutional error in excusing him for cause; that the other jurors must have heard the questioning of Mr. Salazar; and that somehow this cures any inadequacy in the questioning of the other jurors. (St. Atty. pp. 16-17; A.G. Ill. pp. 13-15.)

The respondent's argument in this regard is wholly specious for several reasons.

(a)

The questioning of Mr. Salazar was itself insufficient in light of the Crawford *decision.*

The respondent correctly asserts that the *voir dire* examination of Mr. Salazar established that he would not return a death verdict. But not even Mr. Salazar was questioned on whether his scruples would affect his ability to render an impartial verdict *on the question of guilt or innocence,* apart from the penalty issue. Thus even the examination of Mr. Salazar on which the respondent relies was inadequate to meet the constitutional requirements established in *Crawford.*

(b)

The explanation made to Mr. Salazar was not heard by all the veniremen, and was probably heard by very few.

It is contended that the trial court's explanations to Mr. Salazar was heard by others seated in the courtroom. (A.G. Ill. pp. 13-14; St. Atty. pp. 15-16.) The question is academic and the assertion *dehors* the record, but it should be pointed out that the two separate groups of veniremen who were later brought into the courtroom (R. 731, 843) obviously did not hear what was said to Mr. Salazar.

It is highly doubtful that even those present in the courtroom, particularly veniremen seated in the rear, heard what was said to Mr. Salazar. Acoustics in the large courtrooms in the Criminal Court of Cook County are extremely poor, and it is particularly difficult to hear during the spring and summer months (petitioner's case was tried in April, 1960) when the windows are opened for ventilation. Thus, as the prosecutor told Mr. Salazar,

"there are railroad trains and airplanes and other types of sounds which tend to merge in with your voice and, although we know you're saying something, it's difficult to hear what you are saying." (R. 636.)*

(c).

Even assuming the voir dire of Mr. Salazar was adequate and was heard by the other veniremen, the proper examination of one venireman does not justify the improper excuse for cause of others.

Respondent's argument that the allegedly proper excuse of one venireman cures the improper excuse of over forty others is unsupported by logic or authority. The fact that Mr. Salazar stated in response to questions by the court that his conscientious scruples would prevent his returning a death verdict by no means assures that the next juror who felt a "conscientious scruple" would have responded in the same way to similar questions even if he heard the Salazar *voir dire*.

Indeed, later colloquy with veniremen shows there was no clear understanding of the customary short-hand inquiry. For example, we call the Court's attention to the examination of Mrs. Jedinak, in which she first answered the "conscientious scruple" question "yes," and then following an explanation said "no." She was excused when, in apparent confusion, she said she didn't want to be responsible for deciding someone should be put to death, "I mean, my conscience." (Petitioner's Brief, App. 1, pp. 35-36.)

* The building is bounded on the north by railroad tracks and on the east by a busy thoroughfare, California Avenue, and a large International Harvester plant is located just to the east of California Avenue.

(5)

Without Explicit Inquiry As To the Effect On the Penalty Issue, There Is No Rational Basis For Excluding Scrupled Persons.

It is contended that persons who have conscientious scruples against imposition of the death penalty will of necessity refuse to sign a death verdict, or will be incapable of fairly deciding the question of penalty, hence it is sufficient to ascertain that the scruples exist without further probing. (A.G. Ill. 15; St. Atty. pp. 14-15; A.G. Calif. p. 15.)

The scientific studies before the Court, as well as common experience, show this argument to be fallacious. Conscientious scruples are not commonly regarded as precluding action. Rather, they give rise to hesitation or reflection. At best the phrase is open to the venireman's free interpretation. Thus, Professor Goldberg reports that many scrupled jurors will vote to impose the death penalty when presented with the facts of particular cases. (Petitioner's opening brief, App. 4.) Without further inquiry, there is no justification for concluding that scrupled persons cannot be fair to the state on the penalty issue.*

The Constitution prohibits the mass exclusion of this sober, reflective segment of the community from criminal juries.

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* It is *a fortiori* unjustified to conclude that penalty-scrupled persons cannot be fair to the state on the innocence-guilt issue. See Part (10) below.

(6)

Hoyt v. Florida Is Not In Point.

Respondents place great reliance on *Hoyt* v. *Florida*, 368 U.S. 57 (1961). (A.G. Ill. pp. 32-33; St. Atty. pp. 23-25.) The statute involved in *Hoyt*, unlike Section 743, prohibited calling for jury service any woman who had not registered for jury duty. Thus, women could avoid jury duty at will. The case did not involve purposeful exclusion of qualified persons. Rather, the Florida statute conferred upon women an exemption from jury service, which this Court upheld in the light of women's special status in their homes and the good faith operation of the statute.

In contrast, the case at bar involves a systematic, purposeful and irrational exclusion by the state of a substantial segment of those called and qualified for jury duty. Through the operation of Section 743, scrupled persons who were willing to serve as jurors were absolutely excluded from jury service in murder cases regardless of their ability to be fair to the state on the innocence-guilt and penalty issues.

(7)

Petitioner Does Not Have To Establish That His Jury Was Unfair.

Respondents emphasize that petitioner has not shown that the jury which tried his case was actually unfair or biased against him. (A.G. Ill. pp. 28-31, 35; St. Atty. p. 28.) The State's Attorney asserts that petitioner "has the burden of showing that the jury that tried him was unfair. *Beck* v. *Washington*, 369 U.S. 541, 558 (1962)."

The *Beck* case involved a claim that the jury was tainted by adverse publicity, and is clearly not in point here.

If an unlawful exclusion from jury service is established, this Court has not required proof that the exclusion resulted in prejudice. (Petitioner's opening brief, p. 28.) Thus, as Judge Sobeloff said in *Crawford* (Concurring Op. p. 4, App. A p. 33):

> ". . . it is unnecessary to speculate as to the effect this particular group might have if permitted to participate. *Ballard* v. *United States,* 329 U.S. 187 (1946)."

Compare *In re Murchison,* 349 U.S. 133 (1955), discussed in Part (17) below.

(8)

Scrupled Persons Constitute An Identifiable Class Whose Exclusion From Jury Service Is Proscribed.

Respondents argue that exclusion of scrupled persons is not unlawful because they are not an "identifiable group." (A.G. Ill. pp. 26-31; St. Atty. pp. 22-24.) To the contrary, scrupled persons are readily identifiable by the very fact of their scruples, as shown by the record in this case as well as the records in the *Bumper, Madden* and *Turner* cases. It is not necessary to be able to identify an excluded group by sight (e.g., women, Negroes). This Court has held that the arbitrary and systematic exclusion of any group is unlawful, such as daily wage earners. *Thiel* v. *So. Pacific Co.,* 328 U.S. 217 (1946). Other courts have invalidated exclusion based on religious beliefs. *Schowgurow* v. *State,* 240 Md. 121, 213 A.2d 475 (1965); *Juarez* v. *State,* 102 Tex. Crim. 297, 277 S.W. 1091 (1925). It would be equally unconstitutional to exclude all members of a political party, or all of those who have any view, belief or leaning which is irrelevant to their ability to serve fairly as jurors in the case on trial.

This argument was made by the state and rejected in *Crawford* v. *Bounds,* discussed above in Part (1), page 7, (Op. pp. 27-28, App. A 26).

(9)

The Percentage or Number of Venireman Excluded Only Serves To Aggravate the Constitutional Violation.

The Illinois Attorney General attributes to petitioner the argument "that a prejudice is entitled to be represented on the jury when it is prevalent enough . . ." (Brief, p. 35.) Petitioner's position is not dependent upon the widespread prevalence of scruples against the death penalty. The important fact is that veniremen were arbitrarily excluded by reason of their abstract beliefs as to capital punishment. These beliefs cannot fairly be termed "prejudice," and are unrelated to the veniremen's ability to be fair to the parties.

The high percentage of scrupled veniremen aggravates, but does not create, the constitutional violation. It is therefore erroneous for the State's Attorney to argue that if petitioner's argument is accepted, "legal procedure will change and must change as the polls change." (Brief, p. 26.) Arbitrary exclusion of any identifiable class, however small, is unconstitutional. Thus, Negroes may not be excluded from juries in suburban communities where few Negroes reside, nor can Jews be excluded from jury service in rural Southern communities simply because few Jews live there. Accordingly, the public opinion polls serve chiefly to demonstrate the extent and seriousness of the exclusionary procedure in question here which prohibited almost every second prospective juror from serving in murder cases in which the state qualified the jury for the death penalty.

(10)

Scrupled Veniremen Can Fairly Adjudge the Innocence-Guilt Issue.

To meet petitioner's contention that scrupled persons should not be excluded on the innocence-guilt phase of the trial, respondents and *amicus* take the position that scrupled persons cannot be fair to the state on the question of the defendant's innocence or guilt. Thus, the Attorney General of California states (Brief p. 20):

> ". . . The state or federal governments can reasonably conclude, we submit, that despite any protestations to the contrary, a person scrupled against the death penalty cannot objectively judge the issue of guilt when he knows that a finding of guilt would permit a judge or another jury to impose a sentence of death. . . ."

See also the Illinois Attorney General's brief page 17, and the State's Attorney's brief pages 40 to 41.

There is absolutely no basis for these assertions. They are based upon pure speculation and conjecture. Compare *United States* v. *Wood*, 299 U.S. 123, 149 (1936). *Not one question was asked of any stricken venireman as to whether his views on capital punishment might affect his verdict on the primary innocence-guilt issue.*

The same contention was made and rejected in *Crawford* v. *Bounds*, wherein Judge Winter said (Op. 28-29, App. A. 26-27):

> "The exclusion of all persons from the jury in a capital case who hold conscientious objections to capital punishment cannot be justified on the ground that it is necessary for the effectuation of the interest of an accused and the interest of society in having a fair and impartial jury determine the guilt or innocence of the accused on the facts as presented to

them, and who are not influenced in their judgment by extraneous beliefs regarding one of the possible punishments which might be imposed. There, of course, can be no doubt as to the legitimacy of this interest. But it can be served by the exclusion of a much narrower group than that which was excluded in the instant case—the exclusion of only those whose beliefs would impair their impartiality in determining guilt aside from the question of punishment. It is precisely for this reason that the *voir dire* inquiry should not cease after a determination that the prospective juror is opposed to capital punishment, but should further ascertain whether this opposition would preclude him from making a fair determination on the issue of guilt.

"If a prospective juror's conscientious objection to one of the forms of punishment which the statute allows are so severe as to render him unable to participate, with an open mind, in the jury's deliberations on the culpability of the accused, he is properly challengeable—and should be challenged—for cause. He has demonstrated that he is not an impartial, "indifferent" juror. On the other hand, if a prospective juror with conscientious objections can, in spite of these objections, make an impartial determination on the issue of guilt, his exclusion, if the class to which he belongs become substantial, works to deny to the defendant his right to have his case judged by a jury representative of the community without serving any recognizable, legitimate interest of the state. Objections to capital punishment may be based on many different stages of belief, and involve subtle nuances of conscience. The function of *voir dire* should be to explore these nuances to determine whether the prospective juror would be able to participate fairly in the deliberations on the issue of guilt, confining his judgment to the facts as presented. Under the equal protection clause, *voir dire* cannot be a blunt instrument of systematic exclusion of a widespread segment of the community whose views do not interfere with the interest which the state seeks to protect."

The state which established the single-trial double-issue procedure may not exclude for cause persons scrupled on the penalty issue, because it thereby excluded a substantial segment of the community (here 49%) who, so far as the record here shows, could be fair to both sides on the threshold innocence-guilt issue. *If the states persist in the desire to exclude scrupled persons on the penalty issue, they must either separate that issue from innocence or guilt, or demonstrate explicitly that the scruples will cause bias on the innocence-guilt issue.* Otherwise, the jury which determines the defendant's innocence or guilt is stripped of the substantial segment of the community, such as the 25 million persons represented by the religious-affiliated amici, whose only possible bias is on the penalty issue.

(11)

Petitioner Has Standing To Raise The Scrupled Juror Exclusion Issue.

Repeatedly throughout their briefs, respondents state that the question of excluding scrupled jurors was not raised at trial. It should be noted, however, that petitioner made a pre-trial motion to remove the question of punishment from the jury which tried the issue of innocence or guilt. (R. 70-71.) Furthermore, the Supreme Court of Illinois considered the merits of the scrupled jurors exclusion issue. *Witherspoon* v. *Illinois,* 36 Ill. 2d 471, 475-476 (1967). In *Raley* v. *Ohio,* 360 U.S. 423, 436 (1959), this Court said:

> "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."

(12)

This Court Can and Should Take Cognizance of the Scientific Studies of Professors Zeisel, Wilson and Goldberg.

Respondents attack the adequacy of the studies cited by petitioner to demonstrate that death-qualified juries are prosecution-prone. (St. Atty. pp. 28-37; A.G. Ill. pp. 21-25.) Respondents offer no studies whose findings are in opposition to those offered by petitioner, but rather seek to disparage and criticize the manner in which the tests were performed. They conclude that it is impossible to generalize about people with conscientious scruples against the death penalty without conducting a thorough battery of psychological tests on each prospective juror.

Apart from the effect of conscientious scruples or lack thereof on individual jurors, the studies cited do show conclusively and unanimously that a jury from which all scrupled persons are eliminated is likely to be substantially more partial to the prosecution on the innocence-guilt issue than a jury from which such persons are not excluded. The studies show that the *average* non-scrupled person favors the prosecution more than the average scrupled person.

Each of the scholars cited by petitioner and respondents agree that death-qualified jurors, when confronted with the same factual situation, are more likely than scrupled jurors to return a verdict of guilty and to impose a harsher sentence, and are less likely to accept a defense of insanity. These results are in accord with the everyday experience of practicing attorneys. This is undoubtedly why, for ex-

ample, the *Madden* prosecutor qualified the jury for the death penalty but did not ask for a death verdict.

Respondents seek to minimize the weight of the scientific studies. Thus, the State's Attorney states (Brief p. 30):

> "The fundamental defect of the . . . studies . . . is their total lack of relation to the legal standard of impartiality."

It is difficult to come to grips with this criticism since the State's Attorney does not see fit to explain what he believes the proper "legal standard of impartiality" to be, nor how the studies should have related to that standard. But in any event, the scientist's office is to present the evidence from which lawyers and judges can determine the legal consequences. It cannot be doubted that these studies establish that non-scrupled jurors tend to think in ways that may fairly be characterized as partial to the prosecution. It is for this Court, not Professors Zeisel,* Goldberg and Wilson, to determine how these attitudes relate to the legal standard of impartiality.

The State's Attorney argues that the number of persons interviewed by Professors Goldberg and Wilson is "incredibly small," and he questions whether college students are representative of prospective jurors selected from the entire adult community. (Brief, p. 28.) The first contention demonstrates a lack of knowledge of scientific sampling

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* Professor Hans Zeisel is co-author with Professor Harry Kalven of "The American Jury" (1966), cited by this Court in *United States* v. *Jackson*, 36 Law Week 4277, 4278, fn. 8 (April 8, 1968).

procedures. The important factor is the quality of the sample, not its size. As to the second argument, the State's Attorney does not explain why college students would be expected to respond differently from others having similar views concerning the death penalty.

The State's Attorney faults the studies because the subjects were not exposed to "actual testimony or even to transcript of testimony" and because no instructions were given "concerning the elements of offenses, the presumption of innocence, and burden of proof beyond a reasonable doubt." (Brief p. 29.) The answer is that such trappings are unnecessary to a scientific determination of the attitudes of the subjects. It is not necessary to provide a make-believe courtroom scene in order to probe the beliefs and attitudes of the persons interviewed. Based upon the results of scientific probing, reliable predictions may be made as to the performance of the persons interviewed and other members of the community when they are actually called for jury duty.

The State's Attorney argues that "a test designed to show how an individual reacts to a case without the benefit of group discussion is deficient." (Brief p. 29.) We are well aware that, as the State's Attorney says, "a verdict is the result of collective judgment processes in which the individual jurors consult, debate, exchange viewpoints, change judgments and opinions in order to reach their verdict . . . " (Brief p. 29.) Indeed, the fundamental objection to Section 743 is that it stultifies in advance this crucial opinion exchange and leavening process — what the State's Attorney aptly calls "the dynamics of jury deliberation"— but this process is not necessary to ascertain the attitudes of persons called for jury service, which is all that the scientists set out to do.

The State's Attorney further questions the Goldberg and Wilson studies because the percentage differences between scrupled and non-scrupled jurors "are not high." (Brief p. 29.) This statement overlooks the basic statistical theory applicable in studies such as these. The question is not whether the studies produce large numbers but whether the results are, in the language of the statistician, "statistically significant." The importance of this concept is recognized by both the Illinois Attorney General (Brief pp. 21-22) and the amicus Legal Defense Fund (Fund Brief p. 56). There is no doubt that the central finding—that persons who have no scruples against imposing the death penalty are more likely to find the defendant guilty—is based on statistically significant results. In fact, the results stand unchallenged.

The studies on which petitioner relies bear out the common sense reaction to the question presented. Respondents have failed to produce any valid criticism of these studies. Under such circumstances, there is no valid reason for this Court not to rely on these impartial, scientific studies.

It should be borne in mind that these studies are relevant to only one of the numerous constitutional objections to the jury selection procedure in question here. The rationale of the *Crawford* decision, for example, avoids the need to consider these studies.

(13)

The Impact of This Case Is Limited To Jury Selection Procedures In Capital Cases.

Respondents and the California Attorney General contend that adoption of petitioner's theory will revolutionize and wreak havoc upon *voir dire* practices in a vast number of cases, civil as well as criminal. (St. Atty. pp. 44 to 56; A.G. Ill. pp. 33 to 35; A.G. Calif. pp. 9 to 13.)

These exaggerated, *in terrorem* arguments probably need no response before this Court. A decision favorable to petitioner here need affect only criminal cases in which the prosecution seeks the death penalty. Such a decision would not deprive trial courts of power to exclude for cause veniremen who are shown to be biased against one of the parties. In the hypothetical civil rights prosecutions suggested by respondents (A.G. Calif. pp. 12-13; St. Atty. pp. 53-54), persons who are opposed to civil rights workers or who deem them inferior are clearly subject to challenge for cause.

Petitioner's contention is precisely that no bias was established to justify exclusion for cause of the 47 veniremen excused pursuant to Section 743, because:

First, the superficial questioning of almost all of the excluded veniremen was inadequate to disclose any ground of bias on the penalty issue (Petitioner's opening brief, Part I, pp. 13 to 38), and

Second, even assuming *arguendo* that bias on the penalty issue was shown, no showing of bias was made as to the innocence-guilt issue, and petitioner was entitled to have persons scrupled as to the death penalty serve on his jury to try the question of his innocence or guilt, because they were not shown to be biased on that question. Their exclusion for cause constituted a systematic and arbitrary exclusion of an identifiable segment of the community, and the exclusion system operated to empanel a jury which was likely to be prosecution-prone. (Petitioner's opening brief, Part II, pp. 38 to 43).

(14).

The Issues In The Case Are Ripe For Adjudication.

Petitioner agrees with the Attorney General of Illinois that the issues presented in this case are ripe for adjudication, without further evidentiary hearings. (A.G. Ill. pp. 10-11.) It is indeed difficult for us to comprehend why the amicus Legal Defense Fund argues otherwise,* since the scientific studies cited in petitioner's opening brief (pp. 28 to 32) reach the very same conclusions as those predicted by the Fund in its planned survey. And the Fund concedes that there are grounds upon which this case may be disposed of in petitioner's favor regardless of the Court's views as to the adequacy of the sociological data. (Fund Brief, pp. 51-53.)

Thus, the rationale of the majority in *Crawford* v. *Bounds,* discussed above in Part (1), is entirely independent of these scientific studies.

Petitioner has submitted several contentions to this Court which do not involve the sociological studies, namely:

(1) Section 743 is invalid on its face because it authorizes exclusion for cause without an adequate showing of bias, thus violating petitioner's rights under Due Process and Equal Protection Clauses. (Petitioner's opening Brief, Part I A, pp. 13-16.)

(2) The inadequate *voir dire* questioning led to the mass exclusion of scrupled veniremen without any showing that they could not be fair to the state on the penalty

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* Petitioner consented to the Fund appearing as amicus upon the understanding (later proven to be erroneous) that the Fund concurred in petitioner's position that the issue on which certiorari was granted may properly be adjudicated on the record before this Court.

issue. This irrational exclusion of qualified persons violated petitioner's rights under the Due Process and Equal Protection Clauses. (Brief Part I B, pp. 17-28.)

(3) Even if the scrupled veniremen were biased on the penalty issue, they could be fair on the question of innocence or guilt, and petitioner was entitled to have them qualified to serve on the jury which determined that question. (Brief Part II, pp. 38-43.)

(4) Through the operation of Section 743, petitioner was deprived of his rights under the Equal Protection Clause because the determination as to whether his jury would be stripped of scrupled persons depended on the prosecutor's whim, and because the statute created arbitrary and unreasonable classifications as to the cases in which scrupled persons could be removed for cause. (Brief Part I B (3), p. 22, and Part II A, p. 39.)

(5) The operation of Section 743 discouraged exercise the right to trial by jury. Compare *U. S.* v. *Jackson*, 36 Law Week 4277 (April 8, 1968).

None of the foregoing contentions is related to or dependent upon the sociological studies.

The Fund suggests the Court should remand the case in order to broaden the issues presented, and to consider the scrupled juror exclusion question in conjunction with other constitutional issues. (Brief, pp. 22-30.) But this suggestion flies in the teeth of the settled principle that this Court disposes of cases on the issues before it and then only on the narrowest possible grounds. There is simply no need or occasion for this Court to solicit the introduction of issues not now before the Court. It is best for those issues to come here and be presented when they are ripe for decision in the normal course of litigation. Surely this Court's heavy work load does not lend itself to seeking out extraneous and novel issues.

Since the correctness of the conclusions reached in the scientific studies relied on by petitioner is not challenged by the Fund, there is no reason to require repetitive material to bolster those conclusions. This Court has remanded cases presenting issues of legislative facts only when the record before the Court contained nothing from which the Court could make the needed findings of facts. In *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543 (1924), cited by the Fund at page 71, this Court remanded for a determination of whether the wartime emergency had ended since the only evidence offered on this question had been the statement—of which the Court took judicial notice—that the supply of rental housing in Washington, D.C., exceeded the demand. Similarly in *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194 (1934) (Fund Brief p. 71), the case was remanded because not only was there no evidence with respect to the local milk trade in New York, the regulation of which was brought into question, but also because the allegations in the pleadings did not even suggest the status of the trade. The post-conviction cases cited by the Fund at page 75 are all inapposite; those cases arose on motions to dismiss, and this Court remanded for determination of the facts of the cases.

In the present case the adjudicative facts are agreed. There is no question as to what happened at the *voir dire;* the pleadings in the courts below alluded to the question raised; the Supreme Court of Illinois ruled on the issue; and this Court has before it impartial scientific studies fully supporting petitioner's argument as to the attitudes of scrupled and non-scrupled persons, and the pernicious effect on petitioner's rights by reason of the wholesale exclusion for cause of scrupled veniremen.

Accordingly, no sound purpose will be served by remanding this case for further hearings. This would simply postpone unnecessarily the resolution of an important constitutional issue which is fully and actually presented on the record in this case, and which was disposed of on the merits by the Supreme Court of Illinois.

(15)

Any Rule of Constitutional Law Announced In This Case Should Be Given Full Retroactive Application.

The Attorney General of California contends that if the issues are decided favorably to petitioner, the decision should be given prospective application only, that is, to cases in which the trial commences after the date of this Court's opinion. (Brief, Part II, pp. 25-35.)*

Several *amici* have written in favor of full retroactive application (Bailey Brief, Part II, pp. 7-10; Madden Brief, Part III, pp. 29-33), or to cases in which the death penalty was imposed. (Fund Brief, Part IV, pp. 85-93.)

While it is unnecessary to petitioner's position to consider the general issue of retroactivity (see Part (16) below), we nevertheless think it appropriate that we express our views on that question.

The constitutional guarantees in criminal cases to which retroactive application has been denied are:

(1) The defendant's right to exclusion of evidence seized in violation of the Fourth Amendment. *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

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* The Attorney General suggests also that this Court apply the rule to Mr. Bumper in No. 1016, but not to petitioner in this case, citing *Stovall* v. *Denno*, 388 U.S. 293 (1967). We discuss this issue in Part (16) below.

(2) The defendant's right to be free from comment on his failure to testify. *Tehan ex rel. Shott* v. *United States,* 382 U.S. 406 (1966).

(3) The accused's right to warnings by the police of the constitutional rights to remain silent and to the assistance of counsel. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

(4) The accused's right to counsel during pre-trial confrontation for identification purposes. *Stovall* v. *Denno,* 388 U.S. 293 (1967).

Several newly announced constitutional rights, including Sixth Amendment rights, have been given retroactive effect, including:

(1) The defendant's right to assistance of counsel at all critical stages of the prosecution. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Doughty* v. *Maxwell,* 376 U.S. 202 (1964); *Burgett* v. *Texas,* 88 Sup. Ct. 258 (1967).

(2) The defendant's right of confrontation and cross examination as outlined in *Pointer* v. *Texas,* 380 U.S. 400 (1965). *Brookhart* v. *Janis,* 384 U.S. 1 (1966); *Specht* v. *Patterson,* 386 U.S. 605 (1967).

(3) The responsibility of the state to furnish trial transcripts to indigents on appeal. *Eskridge* v. *Washington Prison Board,* 357 U.S. 214 (1958).

(4) The right to exclusion of coerced confessions. *McNerlin* v. *Denno,* 378 U.S. 575 (1964).

(5) The defendant's right to assistance of counsel on appeal. *Anders* v. *California,* 386 U.S. 738 (1967); *Smith* v. *Arizona,* 389 U.S. 10 (1967).

The language of the decision of the Fourth Circuit Court of Appeals in *Crawford* clearly indicates that the Court there considered that its decision would be applied retroactively. *Crawford,* like this case, arose on collateral attack.

It is unthinkable that a contrary result could be reached in any case where a denial of equal protection of the law is discerned. This Court has never failed to give retrospective effect to a decision finding a denial of equal protection. The reason is probably found in the proposition, recognized in all the retroactivity decisions, that if a constitutionally defective practice affects the basic fairness of the defendant's trial, it must be given retroactive effect. The concept that all citizens are entitled to equal protection of the laws when faced with criminal prosecutions is so deeply seated in our basic concepts of fairness in the administration of criminal justice that to say that a practice denies equal protection is synonymous with saying that it affects the basic fairness of the defendant's trial. Judge Sobeloff put it in a somewhat different way when he said in *Crawford* (Op. 7, App. A p. 36):

> "I read due process as being the broader guarantee of fundamental fairness. For this reason, I cannot envision a mode of jury selection involving an infraction of equal protection that might possibly satisfy the demand of due process."

Judge Sobeloff believes that this case falls within that area where equal protection and due process coalesce (Op. 6, App. A p. 35), and that the opinion should be grounded upon both the Due Process Clause and the Equal Protection Clause, but regardless of which analysis is adopted here, it is clear that exclusion of a substantial class of persons from petitioner's venire because of their views on the penalty question, without determining whether those views

would affect their impartiality on the innocence-guilt issue denied petitioner equal protection of the laws and thus violated fundamental notions of fairness applicable to the trial of criminal cases. The decision should, therefore, be applied retroactively. The effect of retroactive application, however, can be quite limited. As demonstrated in petitioner's opening brief, Appendix 2, many states, by statute or decision, require that jurors' views on the penalty issue be shown to affect their impartiality on the innocence-guilt issue before a challenge for cause will be allowed. This Court may well limit its holding to cases in which no such connection was established in the *voir dire*.

We now turn to consideration of the three criteria set out in *Stovall* for determining whether or not new rules of constitutional law should be applied retroactively in criminal cases (388 U.S. at 297):

(a) *The purpose to be served by the new standards.*

In *Stovall,* this Court pointed out that "We have also retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial." (388 U.S. at 298.) In the case at bar, the make-up of the jury is involved. The constitutional defect goes to the heart of the fact-finding process because it involves the identity and collective attitudes of the finders of fact. That is why in *Crawford* Judge Sobeloff states (Opinion pp. 2-3, App. A. p. 32):

> "The underlying idea in all of the jury selection cases relied upon in the major opinion is that the fairness of the trial was impaired by the deliberate empaneling of a jury not truly representative of a cross-section of the community. To my mind, this is essentially a due process concept expressing the Constitution's interdiction of invidious discrimination in the

method of jury selection. *See Smith* v. *State of Texas,* 311 U.S. 128, 130 (1940). The inherent objection to the exclusion of prospective jurors on account of race, sex, religion, philosophic belief or economic condition is that it opens the way to a fact finder's partiality, bias and unfairness, which are often difficult to demonstrate in a particular case. These exclusions go to 'the very integrity of the fact-finding process' [citing *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965)] which depends on the presence of an impartial jury truly representative of a cross-section of the community. If this basic condition of representativeness is violated due process is denied; and such an exclusion has been held reversible error without a showing of prejudice in the particular case. *See Labat* v. *Bennett,* 365 F.2d 698, 723 (5th Cir. 1966). If a venire list has been so manipulated as to become unrepresentative, it cannot be defended as measuring up to minimum constitutional standards of due process. After all, due process is simply the legal expression denoting fairness, and we are agreed that making the selection from an unrepresentative list is not fair."

In *Glasser* v. *United States,* 315 U.S. 60, 85 (1941), this Court said:

> "Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial."

In *In re Murchison,* 349 U.S. 133, 136 (1955), this Court condemned any practice which might raise questions as to the impartiality of a judge as fact-finder, stating:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

Every defendant in a criminal case is entitled to a trier of fact who will carefully weigh and scrupulously balance every item of proof. To eliminate arbitrarily from this fact-finding body an identifiable segment of otherwise qualified citizens affords the opportunity unfairly to tailor a particular jury to the desires of one side or the other. Where, as here, the basis for exclusion is the expression of scruples against the death penalty, the state is given a clear and unfair advantage over the defendant. Whether the remaining jurors in any particular case are entirely impartial cannot be known. But we do know, based upon the polls and studies cited in petitioner's opening brief, that a jury from which all scrupled persons have been excluded is far from representative of the entire community and is likely to be composed of persons who are inclined in favor of the prosecution. Such a jury cannot help but distort the fact-finding process. The impanelling of such juries presents a clear danger of convicting the innocent and of the imposition of harsher sentences on the guilty.

(b) *The extent of the reliance by law enforcement authorities on the old standards.*

The Attorney General of California recognizes that this Court has never sanctioned the practice of excluding scrupled jurors for cause as against the constitutional arguments presented in this case. (Brief p. 29.) This Court's only prior ruling on this practice is *Logan* v. *U.S.*, 144 U.S. 263 (1892) (discussed in petitioner's opening brief at pages 36 and 37), but in that case no constitutional arguments were presented to or ruled upon by the Court. Accordingly, unlike most of the non-retroactivity cases cited above, it cannot be said that the states have relied on any sanction by this Court of the constitutional validity of the practice of excluding scrupled jurors for cause.

The California Attorney General contends there was reliance because "The federal courts of appeals have repeatedly and recently upheld the practices. [Citing cases.]" (Brief p. 28.) But with the exception of the 1954 decision of the Second Circuit Court of Appeals in *U.S.* v. *Puff*, 211 F. 2d 171 (2d Cir. 1954), *cert. denied*, 347 U.S. 963, all of those cases were decided *after* petitioner was tried in 1960. This Court and only this Court is the final arbiter of issues of federal constitutional law. There simply was no authoritative body of federal law on the constitutional issues involved here at the time of petitioner's trial.

Prior to the *Puff* decision, several state courts of last resort held that the existence of scruples against the death penalty was *not* sufficient to justify the state's challenge for cause. (Petitioner's opening brief, p. 15, fn.; *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State* v. *Garrington*, 11 S.D. 178, 76 N.W. 326 (1898).) Many other state reviewing courts had sanctioned the challenge for cause only when the prosecution demonstrated that the scruples would affect the veniremen's verdict. (See Annot. at 48 A.L.R. 2d 560, 574 to 576.) Furthermore, most state statutes on the subject require a showing of nexus between scruples and verdict. (Appendix 2 to Petitioner's opening brief.) Only five states—Illinois, Georgia, Louisiana, Alabama and Texas—have enacted laws which permit exclusion for cause on the basis of scruples alone, unconnected to the effect they may have on the verdict (although in practice the statutory requirements have not always been observed).

In light of these facts, it cannot fairly be said that Illinois relied on decisional law upholding its practice of automatic exclusion of scrupled veniremen without demonstrating that their scruples would affect their ability to be fair to the state on the issue of innocence or guilt, or even on the penalty issue.

(c) *The effect on the administration of justice of a retroactive application of the new standards.*

The Attorney General of California argues that the effect of retroactive application "would be chaotic." (Brief p. 29.)

Petitioner suggests that the effect of retroactive application will depend upon the ground of the Court's ruling:

—If the Court holds that Section 743 on its face violates the Equal Protection Clause because it applies in murder cases but not in other cases in which the death penalty may be imposed (as argued in petitioner's opening brief at pp. 22 and 39-40), the effect of the decision will be quite narrow. The decision will be applicable only to Illinois, and there, applicable only to cases tried prior to January 1, 1964 when Section 743 was repealed. All of the other state statutes dealing with *voir dire* examination respecting scruples apply to all capital cases, not just to one kind of capital case (murder) as in Illinois. (See Appendix 2 to petitioner's opening brief, pp. 45-55.)

—If the Court holds that Section 743 violates the Equal Protection Clause because it vests an unfettered discretion in the prosecutor to determine the make-up of juries in capital cases (as argued in petitioner's opening brief at pp. 22 and 39-40), the decision will have a wider effect because it will apply to all capital cases except perhaps those in which death is a mandatory penalty.

—If the constitutional infirmity relates to the failure to demonstrate that the scruples would prevent veniremen from being fair to the state on the penalty question (as argued in Part I A of petitioner's opening brief, pp. 13-16), the number of cases affected will probably be relatively small, since most states by statute and court decision require the showing of such a nexus as a condition prece-

dent to the state's challenge for cause. (See Annot. at 48 A.L.R.2d 560, 581 to 585, and statutes set out in petitioner's opening brief, Appendix 2; pp. 47, 50-55.*)

—If the constitutional infirmity relates to the failure to demonstrate that the scruples would prevent veniremen from being fair to the state on the innocence-guilt issue (as argued in Part II of petitioner's opening brief, pp. 38-42, and as held by the majority of the Fourth Circuit Court of Appeals in the *Crawford* case, Appendix A to this brief), a greater number of cases would be affected. But here again the number would be restricted because many states by statute and court decision require the showing of such a nexus as a condition precedent to the state's challenge for cause. (See statutes set forth in Appendix 2 to petitioner's opening brief, pp. 47-50, and the cases are found in the annotation at 48 A.L.R. 2d 560 *et seq.*)

—If the Court holds that the operation of Section 743 unlawfully discourages criminal defendants from exercising their right to trial by jury (as argued in Part (2) above pursuant to this Court's opinion in *United States* v. *Jackson*, 36 Law Week 4277 (1968)), the decision will apply to all states in which this form of *voir dire* interrogation is permitted. However, this Court may hold that a ruling on this basis is applicable only in cases in which the state failed to establish a nexus between scruples and the verdict.

—If the Court should decide the case on the ground that death-qualified juries are prone to the prosecution

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* We wish to call the Court's attention to the following Maryland statute which should be added to Appendix 2 of petitioner's opening brief:

> "Hereafter no person shall be disqualified for service as a juror of this State by reason of his beliefs against capital punishment."
>
> MD. CODE ANN. Art. 51 § 8 A (Supp. 1967).

(as argued in petitioner's opening brief in Part I C and D and II A, pp. 28-36 and 38-40, a view adopted by Judge Craven in the *Crawford* case, App. A pp. 37-38), the Court again may limit its ruling to cases where no nexus was established between the scruples and the verdict on the innocence-guilt issue.

It is, of course, impossible to gauge in advance the precise effect of any of these possible rulings. But the states have no justifiable interest in convicting the innocent, or in overriding the defendant's right to a fair trial on all issues merely to secure a verdict of death. We therefore submit that a right sense of justice argues for full retroactive application regardless of the decision's effect on other cases.

In the event this Court determines that the rule should not be given full retroactive effect, we submit the rule should be applied retroactively to those, such as petitioner, who have been sentenced to death. Surely infliction of the ultimate penalty should not be sanctioned when one-half of the community was arbitrarily excluded from the juries which imposed those penalties, and the remaining jurors do not represent a fair cross section of the community and have been shown to be prone to the prosecution on the issue of penalty as well as on the issue of innocence or guilt.

(16)

Even If the Court Applies the Ruling In This Case Prospectively, Petitioner Should Be Afforded the Benefit of the Rule.

Since petitioner's case is one of the two in which this Court has undertaken to decide the important constitutional questions involved here relating to *voir dire* examination in capital cases, he should be afforded the bene-

fit of a favorable decision, even if the Court decides to apply the rule prospectively. As this Court said in *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967):

> ". . . we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making."

We respectfully disagree with the ruling that Stovall was not entitled to the benefit of the new rule announced in the *Wade-Gilbert* cases. (388 U.S. 218 and 263 (1967).) Certiorari was granted in *Stovall* one week after *Gilbert* and over three months before *Wade*. (384 U.S. 985, 1000; 385 U.S. 811.) The cases were argued and decided together. The only distinction between the two cases was that *Wade* and *Gilbert* came before the Court in certiorari from a direct state court appeal, whereas *Stovall* came on certiorari from a federal court habeas corpus proceeding after exhausting state remedies. We suggest that this distinction is immaterial with respect to the question whether *Stovall* should have been granted the benefit of the new rule.*

There is nothing in any of the Stovall opinions which articulates a reason why this Court declined to grant Stovall the benefit of the new rule. Rather, having concluded that the *Wade-Gilbert* rule should not be made retroactive (388 U.S. at 300), the Court asserted that the benefit of the rule would be afforded to *Wade* and *Gilbert* as "the parties in the case in which [the new rule] is

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* Mr. Justice Walter V. Schaefer of the Supreme Court of Illinois said concerning *Linkletter* v. *Walker*, 381 U.S. 618 (1965):

> ". . . the Court makes retroactivity turn upon whether a particular judgment is being reviewed upon direct appeal or on collateral attack, a matter that is totally unrelated to reliance upon the former legal doctrine." Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 N.Y.U. L.Rev. 631, 644-45 (1967).

announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue." (388 U.S. at 301), without explaining why, by the force of the Court's reasoning, Stovall was not likewise deemed to be a party to the case in which the new rule was announced and therefore "a chance beneficiary" of the new rule.

Even if petitioner's case was taken by the Court for the purpose of determining the issue of retroactivity, any rule announced may be held to be retroactive and nevertheless applied to petitioner without violating the principle that a "case or controversy" is a prerequisite to adjudication. When, as in *Stovall,* the Court adjudicates a new constitutional rule and the issue of retroactive application at the same time, there is no reason or policy which precludes granting the benefit of the rule to every litigant whose case is then before the Court.

There is no equitable consideration which should impel the Court to distinguish among the litigants whose cases serve as the vehicle to adjudication of a new rule of constitutional law. Every party whose case is involved, including those whose cases are before the Court on "collateral" review, should be treated alike. Parties on "collateral" review, just as parties before the Court on certiorari from direct appeal, have evolved "concrete cases or controversies" and have utilized "the incentive of counsel to advance contentions requiring a change in the law." (388 U.S. at 301.) These "policies of decision-making" are just as applicable to petitioner's case as to Bumper's, and it is completely immaterial that petitioner is here on certiorari from collateral review while *Bumper* comes before the Court on certiorari from direct review. Application of the rule to Bumper and not to petitioner will serve to

demean the precious right of habeas corpus, the importance of which has often been recognized by this Court.

Accordingly, even if this Court determines that a rule of constitutional law announced in this case should be given prospective effect only, petitioner in this case should receive the benefit of that rule.

(17)

Considering the Totality Of Circumstances Surrounding the Selection Of Petitioner's Jury, Petitioner Was Denied Equal Protection and Fundamental Due Process.

Even if this Court should decide that one or more of petitioner's specific constitutional arguments is valid but that petitioner himself is to be denied the benefit of the decision, there remains, as this Court held in *Stovall*, the question of whether petitioner was deprived of the fundamental right to a fair trial before an impartial tribunal under the Due Process Clause. We submit that he was.

If this Court finds, as we urgently suggest, that the wholesale elimination of scrupled jurors results in leaving a prosecution prone venire from which the jury is to be selected, there can be no doubt that defendant's fundamental due process rights were violated. Regardless of whether the jury which actually tried petitioner was in fact prosecution prone, the right to trial before an impartial tribunal is so fundamental that even hint or possibility of partiality results in a violation of fundamental concepts of due process. Indeed, we believe that even if the Court limits its holding to finding that the arbitrary and systematic exclusion of a substantial class of juries violates the Constitution, without reaching prosecution prone issue, the Court should find a violation of fundamental due process, for where the make-up of the fact

finding tribunal is concerned every improper practice which creates even the possibility of affecting the fairness of the tribunal is abhorrent to basic concepts of justice. As this Court said in *In re Murchison*, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.' *Tumey* v. *State of Ohio*, 273 U.S. 510, 532."

Of course, if the Court adopts the equal protection analysis of *Crawford* the decision will certainly be applied retroactively, as indicated above, but the same result is also reached by applying the "fundamental due process" test, for as Judge Sobeloff points out in *Crawford* (Op. p. 7, App. A. p. 36):

> " . . . I cannot envision a mode of jury selection involving an infraction of equal protection that might possibly satisfy the demand of due process."

Apart from any individual ground for decision of the issues in this case, however, the totality of circumstances surely shows a violation of fundamental due process. Forty-seven jurors, or 49% of those questioned were excused for their views on the death penalty. They were not asked a single question as to whether their views on the penalty

would affect their impartiality on the guilt issue, and were not even asked whether their scruples would prohibit their considering the death penalty if instructed to do so. On the other hand, the state was permitted to extract a solemn pledge from virtually every remaining juror that he would vote for the death penalty rather than any other in the nebulous and undefined "proper case." Under these facts, a violation of basic concepts of fairness in the trial of criminal, and especially capital cases, seems apparent.

At the very least, the empaneling of a jury from which every person who expresses any opposition to the death penalty has been removed, leaving only jurors who favor the penalty to decide the *penalty* issue, where a wide range of penalties are to be considered, surely violates fundamental principles of fairness in the penalty fixing phase of the trial, to which the Due Process Clause applies. On this extremely narrow ground petitioner's case must at least be remanded for resentencing before a fair tribunal.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 10,981

Marion Frank Crawford,

Appellant,

versus

V. Lee Bounds, Warden of Central Prison (Successor to K. B. Bailey),

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
Algernon L. Butler, Chief Judge.

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges.*

Decided April 11, 1968

M. C. Burt, Jr. (McKissick & Burt on brief) for Appellant; William Van Alstyne as Amicus Curiae; Daniel H. Pollitt (Charles F. Lambeth, Jr. on brief) for the North Carolina Civil Liberties Union, as Amicus Curiae, and Ralph A. White, Jr., Staff Attorney, Office of the Attorney General of North Carolina (Thomas Wade Bruton, Attorney General of North Carolina, and Theodore C. Brown, Jr., Staff Attorney, Office of the Attorney General of North Carolina on brief) for Appellee.

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* The case was argued initially, on January 12, 1967, before a panel of the Court consisting of Bell and Winter, Circuit Judges, and Russell, District Judge. Because Judge Bell died before decision in the case and because of the importance of the issues, the Court, on its own motion, ordered reargument en banc.

WINTER, Circuit Judge:

Petitioner, a thirty-year-old male Negro, was convicted of first degree murder of an eight-year-old female Negro child, occurring in the course of the commission of rape, allegedly perpetrated by him November 18, 1962.[1] N.C.Gen. Stat. § 14-17. Petitioner was found guilty and, because the jury's verdict contained no recommendation for mercy, petitioner was sentenced to death. On appeal, the judgment entered on petitioner's conviction was affirmed. *State v. Crawford,* 260 N. C. 548, 133 S.E.2d 232 (1963).

About an hour prior to the time that capital punishment was to be carried out, petitioner sought a writ of habeas corpus from the district court. He obtained a stay of execution, but he was remitted to available state remedies, not then exhausted. The district court retained jurisdiction until state exhaustion had occurred. Petitioner sought post-conviction relief and was afforded a plenary hearing, where he was represented by court-appointed counsel. N.C.Gen. Stat. § 15-217. Relief was denied him and the issuance of a writ of certiorari was denied by the Supreme Court of North Carolina. He then renewed his application for a writ of habeas corpus in the district court, which, after considering it, the record extract and briefs of the appeal in his original trial, and the transcript of the state post-conviction proceeding (ex-

[1] Petitioner was also indicted for rape, itself a capital offense under the laws of North Carolina. N.C.Gen.Stat. § 14-21. He has never been tried on this indictment.

cluding the exhibits admitted at that hearing), summarily denied him relief.[2]

Before the district judge, petitioner advanced numerous contentions why the judgment entered on his conviction was invalid. He claimed, generally, that he was denied due process of law, in that he was never adequately informed of the charges against him and was convicted of a crime with which he was not charged, and that he was denied his right to indictment by grand jury because the prosecutor was permitted to amend the indictment to include matters not presented to the grand jury; that he was denied his right to a trial by an impartial jury because the prosecutor was permitted to challenge for cause prospective jurors who expressed sentiments against capital punishment; that he was denied due process because the prosecutor refused to accept a plea of guilty with sentence of life imprisonment; that he was denied due process because the prosecutor announced, prior to trial, that he would seek the death penalty, the prosecutor introduced irrelevant evidence at the trial for its inflammatory effect on the jury, told the jury of petitioner's prior criminal record, and pleaded with the jury for the death penalty; that he was denied a fair trial because inflammatory evi-

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[2] Before petitioner's application was considered on its merits, an amended application was dismissed for failure to state a claim on which relief could be granted. We reversed, *Crawford* v. *Bailey*, 360 F.2d 596 (4 Cir. 1966), with directions to allow the filing of a supplemental petition incorporating previous allegations by reference. Such a supplemental petition was filed on remand. It was the supplemental petition, incorporating all previous allegations, that was dismissed.

dence, including pictures of the deceased's body and her private parts, was exhibited to the jury; that he was denied effective assistance of counsel because a lawyer was not appointed to represent him before the preliminary hearing and, when his court-appointed counsel was appointed, he represented petitioner incompetently; and that the North Carolina statute relating to the death penalty is unconstitutional on its face and in its application to members of the Negro race.

Most of these claims of invalidity were pressed at the state post-conviction hearing and evidence was offered in support of many of them. Absent any suggestion of waiver or deliberate bypass, and there is none, petitioner has exhausted his available state remedies in regard to the contentions made before the district court. *Stem* v. *Turner*, 370 F.2d 895 (4 Cir. 1966); *McNeil* v. *State of North Carolina*, 368 F.2d 313 (4 Cir. 1966). We conclude that petitioner is entitled to a writ of habeas corpus because his constitutional rights were violated by the manner in which the jury to determine his criminal responsibility was selected, and particularly because the prosecutor was allowed successfully to challenge prospective jurors for cause who expressed sentiments against capital punishment and thus to disqualify a substantial segment of the panel, without the additional determination being made that their objections to capital punishment would preclude them from rendering a fair verdict on the issue of guilt.[2a] We confine our

[2a] We take note that on January 15, 1968, the Supreme Court granted certiorari in *Witherspoon* v. *Illinois*, No. 344 Misc., 36 L. W. 3286 (January 16, 1968), and *Bumper* v. *North Carolina*, No. 678 Misc., 36 L. W. 3286 (January 16, 1968), 36 L. W. 3298-3299 (January 23, 1968), in which substantially the same question is presented. We, nevertheless, deem it appropriate to express our views.

consideration, therefore, to that issue.[3]

It is undisputed that members of the panel, from which the jury that convicted petitioner was chosen, were interrogated as to whether they had any sentiment or reservation against capital punishment; and any who expressed any such sentiment or reservation were, at the request of the prosecutor, immediately excused for cause without further inquiry. Thirty-four of seventy-five prospective jurors were disqualified on this broad ground. None of these thirty-four was asked whether his scruples against capital punishment would interfere in any way in the determination of petitioner's guilt or innocence. Thus, 45.33% of the cross-sectional panel was eliminated from service on the petit jury because of a conscientious scruple toward capital punishment without inquiry as to what effect, if any, their scruples would have on their ability to decide

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[3] We do not suggest that petitioner's other contentions either possess or lack merit. It suffices that we see no constitutional bar to retrial. Since petitioner's original trial counsel was granted leave to withdraw from representation of petitioner, even prior to the Federal Court proceedings, our decision renders moot the claim of denial of effective representation of counsel. We assume, on retrial, that with alert and competent counsel, petitioner will have full opportunity to litigate vigorously (1) any attempt of the state to use the photographs complained of here under *State* v. *Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963), (2) any attempt of the state to repeat the argument complained of here under *Hall* v. *United States*, 150 U.S. 76 (1893), and *Wagner* v. *United States*, 263 F.2d 877 (5 Cir. 1959), (3) the sufficiency of the indictment and notice to petitioner under *McClure* v. *State*, 267 N.C. 212, 148 S.E.2d 15 (1966), and (4) any other procedural or substantive issues that counsel deem advisable to raise, all under the authorities cited and any others pertinent to those issues.

the issue of petitioner's guilt or innocence.[4] Moreover, four veniremen were peremptorily challenged by the prosecution after preliminary questioning established that they were less than firm believers in capital punishment. Including these four, thirty-eight out of seventy-five veniremen (50.66% of the total) were thus excluded from petit jury service for these reasons.

In sharp contrast to the 45.33% of excluded jurors, a juror who admitted that he had "more or less, a fixed opinion" about the case as a result of reading about it in the newspaper was permitted to serve after the trial judge questioned him and elicited the further answers that the juror could "erase" the opinion from his mind, and that he could "disabuse" his mind of the opinion, and decide the case solely on the evidence adduced in court, applying thereto the court's instructions, so as to give the state and petitioner a fair trial. The challenge of defense counsel for cause was denied.

Thirty-one jurors were accepted by the prosecutor. Only thirteen were actually empaneled, but each of the thirty-one professed a belief in capital punishment. Indeed, one of the thirteen stated that he believed "in the doctrine of an eye for an eye," and that he believed it would be his *duty* to sentence a defendant found guilty of murder to capital punishment. Thus, while no person known to entertain even an unexamined scruple regarding the death pen-

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[4] The percentage is startlingly close to the results of a 1966 Gallup Poll which showed 47% of those interviewed were opposed to capital punishment. The results of the poll were adopted and reported in *Task Force Report*: *The Courts*, The President's Commission on Law Enforcement and Administration of Justice (1967) 27. The results of the poll were summarized in the main report of the Commission, *The Challenge of Crime in a Free Society* (1967) 143.

alty was permitted to qualify, a juror known to regard a sentence of death as his "duty" was permitted to serve.

In permitting the veniremen in petitioner's case to be examined on *voir dire* as to their reservations or sentiments against capital punishment and excusing them on challenge for cause if they evidenced conscientious scruples against imposition of capital punishment, the original trial judge proceeded in accordance with established North Carolina practice, approved over sixty-three years before. *State* v. *Vick,* 132 N. C. 995, 43 S.E. 626 (1903); *State* v. *Vann,* 162 N. C. 534, 77 S.E. 295 (1913); *State* v. *Arnold,* 129 S.E.2d 229 (1963), rev'd. on other grounds, 376 U. S. 773 (1964). See also, *State* v. *Manning,* 251 N. C. 1, 110 S.E.2d 474 (1959) (concurring opinion); *State* v. *Childs,* 269 N. C. 307, 152 S.E.2d 453 (1961). It is significant that the *Arnold* and *Childs* cases arose and were decided after a 1949 amendment to the criminal statutes of North Carolina which permitted, for the first time, a jury in a prosecution for first degree murder upon a determination of guilt to exercise a choice between the imposition of death or life imprisonment. Theretofore death was the exclusive and inevitable judgment to be entered on a jury's verdict of guilt of first degree murder.

The text of the 1949 amendment is set forth in the margin and consists of the emphasized portion of N.C.Gen. Stat. § 14-17.[5] The function of the jury under the amend-

[5] "§ 14-17. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at*

ment has been considered in many decisions. In *State* v. *McMillan*, 233 N. C. 630, 65 S.E.2d 212 (1951), it was held that an instruction to the jury that the statute gave them the right to recommend life imprisonment "if they feel that under the facts and circumstances of the crime alleged to have been committed by the defendant, they are warranted and justified in making that recommendation" and that if they did not feel "under the facts and circumstances" that such a recommendation was warranted, they should act accordingly, vitiated an otherwise valid conviction in which a verdict, without recommendation, was returned. The vice in the instruction was, the Court said, that it placed unauthorized restrictions upon the discretion vested in the jury:

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning,—a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature. * * *
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> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's

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the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." (emphasis supplied)

Similar language was added to N.C.Gen.Stat. §§ 14-21, 14-52 and 14-58 at the same time. These statutes provide optional penalties of death or life imprisonment for rape, first degree burglary and arson, respectively.

prison. * * * *No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right.* And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error sufficiently to set aside a verdict where no recommendation is made." (emphasis supplied) *Id.*, 65 S.E.2d, at p. 213.

The consistency with which North Carolina has adhered to the rule of "unbridled discretion" was fully documented in the concurring opinion of Justice Denny in *State* v. *Pugh*, 250 N. C. 278, 108 S.E.2d 649 (1959), which discussed the twelve cases which arose between the date of the statute and 1959. Review of all of them is unnecessary. It suffices to say that in *State* v. *Simmons*, 234 N. C. 290, 66 S.E.2d 897 (1951), it was held erroneous to characterize to the jury that the statute imposed a "duty" to consider recommending life imprisonment; in *State* v. *Dockery*, 238 N. C. 222, 77 S.E.2d 664 (1953), it was held reversible error for the prosecutor to argue against life imprisonment because of the possibility of parole; in *State* v. *Denny*, 249 N. C. 113, 105 S.E.2d 446 (1958), it was held error for the judge to tell the jury that it could not consider the death penalty, where the prosecutor had stated that he was not seeking the death penalty; and in the *Pugh* case it was held error for the trial judge to state the ultimate contention of the prosecutor that mercy should not be recommended. The later decided cases of *State* v. *Manning*, *supra*, and *State* v. *Christopher*, 258 N. C. 249, 128 S.E.2d 667 (1962), are fully in accord.

Petitioner argues that the practice of obtaining a so-called "death-qualified" jury, by the allowance of successful challenge for cause of all persons with conscientious

scruples against capital punishment, interferes with the "unbridled discretion" of the jury. This is a question of state law which we consider settled adversely to petitioner's contention by *State* v. *Arnold, supra,* and *State* v. *Childs, supra.*[6] Petitioner also argues that the practice of obtaining "death-qualified" juries offends current concepts of due process and equal protection of the laws.

At the outset, we think that petitioner would be entitled to the writ because of the inherently unfair manner in which the jury was selected in this case. Our recitation of the proceedings exposes two salient facts (1) a venireman who thought it was his "duty" to impose capital punishment in the event of conviction was permitted to serve, while those whose dictates of conscience would presumably feel a converse duty were summarily excluded from service, and (2) a venireman who had reached an opinion about the case, prior to trial, was interrogated by the trial judge until his qualification to serve was established, while those who admitted to scruples against capital punishment were dismissed without further interrogation. We cannot escape the conclusion that, as a result of insufficient interrogation and a double standard of inquiry, the petit jury selected

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[6] The North Carolina Supreme Court has not addressed itself specifically to the argument that the scope of "unbridled discretion" is so broad and the jury so clearly entitled to exercise it for reasons *dehors* the record, that as a matter of statutory construction a juror should be free to recommend life imprisonment because of a conscientious belief against capital punishment; but in its latest decision, *State* v. *Childs,* 269 N.C. 307, 152 S.E.2d 453, 461 (1967), has impliedly rejected it, saying: "It is a general rule that the State in the trial of crimes punishable by death has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty."

was at the outset more likely to impose capital punishment in the event of conviction than not. The unexamined "duty" of one member of the panel may have been so strong that no verdict of guilt, except one imposing capital punishment, could have been returned. Certainly, the concept of "duty," standing alone, carries that inescapable inference. Petitioner was, therefore, denied due process of law in violation of the Fourteenth Amendment.

That the Fourteenth Amendment guarantees "to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors" is established by *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961). Prejudice, bias or other basic form of predisposition on the part of the trier of the fact results in a denial of due process. *Re Murchison,* 349 U. S. 133 (1955); *Re Oliver,* 333 U. S. 257 (1948); *Tumey* v. *Ohio,* 273 U. S. 510 (1927); *Reynolds* v. *United States,* 98 U. S. 145 (1879). Where North Carolina has chosen to make the degree of punishment a jury question in the event of conviction, as in the instant case, the guaranty that a juror be "impartial, 'indifferent'" is as applicable to the issue of punishment as to the issue of guilt. To permit a juror whose mind is foreclosed on one side of that issue to serve, while eliminating those who think to the contrary, and to exert special effort to qualify one whose mind may be foreclosed on the issue of guilt, while freely excusing those who indicate a predisposition as to punishment, were not the ways to achieve the constitutional objective. Denial of equal treatment in the manner of selection inevitably resulted in denial of due process.

Stroud v. *United States,* 251 U. S. 15 (1919), 251 U. S. 380 (1920), is a case directly in point with what was done in regard to the juror who felt himself under a "duty" to impose capital punishment in the event of conviction. There it was said that a challenge should be

sustained to a juror whose testimony "made it reasonably certain that, in the event of conviction for murder in the first degree, he would render no other verdict than one which required capital punishment." *Id.*, 251 U. S., p. 381. See also, *Reynolds* v. *United States, supra.* It is true that in *Stroud* the court's failure to sustain the challenge was held not reversible error because the accused had been afforded more peremptory challenges than he was entitled to by law and the accused had challenged peremptorily the juror in question, so that, in the view of the Court, it could not be said that the accused's right to challenge peremptorily was abridged. Here, petitioner was afforded only the number of peremptory challenges permitted him by law, and he consumed them all in the selection of the jury. Unlike *Stroud,* there is no ground to say that petitioner was not prejudiced.

While our decision may be rested on the narrow ground that, by reason of the manner of selection of the jury, petitioner was denied due process of law, this record reflects a more significant denial of constitutional right and one which is not correctible on retrial under North Carolina law and practice as they now prevail. Since we order petitioner's retrial, it is appropriate to rest our decision on the systematic exclusion of jurors in violation of the equal protection guaranty resulting from the disqualification of jurors to try the issue of guilt who expressed reservations about the imposition of capital punishment lest we be understood at some later stage of this case, or in a comparable proceeding, to have given our implied approval to it.

In addressing ourselves to this basis of decision, we are met at the outset with the vast array of judicial authorities which have approved the existence of beliefs regarding capital punishment as a proper ground for

disqualification of jurors for cause in capital cases. As the cases collected in Annotation, *Juror-Capital Punishment Scruples,* 48 A.L.R.2d 560 (1965), demonstrate, and the annotator states:

> "Upon the theory that conscientious scruples against infliction of the death penalty under any circumstances, or equivalent beliefs, equally disqualify a juror for cause in a prosecution for a capital crime, whether the law prescribes the single punishment of death upon conviction, or invests the jury, upon conviction, with a discretionary power to assess death or life imprisonment according to the evidence and circumstances, the rule has become generally accepted that where the jury is vested with such discretion the state may challenge for such cause because it is entitled to the maximum penalty if the proof shall justify it, and to contend throughout the trial and finally to the jury that the character of the crime justifies it."

A thorough analysis of the state of the law was made in *United States* v. *Puff,* 211 F.2d 171 (2 Cir. 1954), where Puff was found guilty of first degree murder without recommendation for mercy under 18 U.S.C.A. § 1111, the federal statute which directs that an accused determined "guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life." Twelve talesmen had been excused for disclosed scruples against capital punishment. Puff sought reversal of the judgment, arguing that, since a jury should be a cross-segment of society, a scruple or fixed belief for or against capital punishment in murder cases was not a disqualification for jury service in a murder case and, therefore, the excuse of talesmen on that ground resulted in an unbalanced jury not truly reflecting contemporary social thought. His contention was rejected and the judgment affirmed.

In arriving at this result, the court reviewed the cases prior to the enactment of the Act of January 15, 1897, 29 Stat. 487, which first permitted the jury to recommend life imprisonment in a first degree murder case, as well as those subsequent to the enactment of the statute. In the latter group the only Supreme Court decision is that of *Stroud* v. *United States, supra,* where it was said that a juror should be excused for cause if, from his preliminary examination, it was reasonably certain that, in the event of conviction for murder, the juror would render no other verdict than one which required capital punishment. From the *Stroud* case, the Court of Appeals in *Puff* reasoned that if jurors with bias in favor of capital punishment are disqualified, jurors with bias against the death penalty should be similarly disqualified.[7] The Court concluded that all federal decisions were contrary to Puff's contention.

The Court next considered the decisions of the state courts. It noted three cases[8] in which the defendants argued that the modification of a statute under which the death penalty was mandatory by provision for an alternative punishment by imprisonment with power in the jury to decide between the two alternatives impliedly repealed the disqualification for scruples against capital punishment which had theretofore existed, but where the argument was rejected; it also noted two courts which had

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[7] This statement in *Stroud* was dictum because, as appears from an examination of both opinions in the same case, the juror to whom reference was made was in fact peremptorily challenged.

[8] *State* v. *Owen,* 73 Idaho 394, 253 P.2d 203 (1953); *Rhea* v. *State,* 63 Neb. 461, 88 N.W. 789 (1902); *State* v. *Riley,* 126 Wash. 256, 218 P. 238 (1923).

held that a challenge for cause on that ground would not lie.[9] The Court collected further the many other decisions in states having statutes similar to the Act of January 15, 1897 in which, absent the specific contentions made in the five courts to which reference has been made, it had been held that scruples against capital punishment are a proper ground for disqualification for cause. Following its reference to this imposing array of authority, the Court stated:

> "It will be noted that all the cases above cited stem from the fundamental theory that the American jury should be composed of impartial jurors. As a result, a party is entitled to an array of impartial jurors to which he may direct his peremptory challenges. To this a party is entitled as of right. But granted this, a party is entitled to no more. Having no legal right to a jury which includes those who because of scruples or bias he thinks might favor his cause, he suffers no prejudice if jurors, even without sufficient cause, are excused by the judge. Only if a judge without justification overrules a challenge for cause and thus leaves on the panel a juror not impartial, does legal error occur." *Id.*, pp. 184-185.

The Court then turned directly to Puff's contention that the Act of January 15, 1897 should be interpreted to except the general doctrine that scruples against capital punishment constitute a ground of disqualification for cause from application to cases arising under the Act—in other words, that the Act impliedly eliminated scruples or bias against capital punishment as disqualification for cause and sanctioned "balanced juries," which might properly include jurors with such scruples. This argument was rejected, with this statement:

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[9] *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State* v. *Wilson*, 234 Iowa 60, 11 N.W.2d 737 (1943); *State* v. *Garrington*, 11 S.D. 178, 76 N.W. 326 (1898).

> "It will readily be seen that this 'balanced' jury, which the defendant envisages, is in reality 'a partisan jury': if, as he urges, it may include jurors with bias or scruples against capital punishment it must —if it is to have 'balance'—include also those with bias in favor of the death penalty as the punishment for murder. It is settled by Andres v. United States, 333 US 740, 68 S Ct 880, 92 L ed 1055, that under the Statute the verdict must be unanimous both as to guilt and as to punishment. As a result, as Mr. Justice Frankfurter noted in his concurring opinion, 333 US at page 766, 68 S Ct at page 892, 92 L ed at page 1070, any juror 'can hang the jury if he cannot have his way' as to the sentence which *he* deems appropriate. These considerations lead to the conclusion that trials before 'balanced juries,' even on unanimous findings of guilt, would frequently result in disagreements. And disagreements on successive trials would result in practical immunity from murder. We cannot believe that the Statute was intended to have such a tendency." *Id.*, p. 185.

We have recited at length the reasoning of the Second Circuit in *Puff* because its chain of logic and the authorities which it cites provide the context of our decision today. But in *Puff* there was not recognition that what constitutes partiality of a juror on the issue of punishment does not necessarily constitute partiality of a juror on the issue of guilt, and *Puff* was not decided on a record which developed the substantial systematic exclusion which, by virtue of prevailing community sentiment, inevitably results when jurors, disqualified as to the issue of punishment, are considered to be disqualified automatically as to the issue of guilt. *Puff* established the rule that when a sentencing procedure requires a jury to assess guilt and fix punishment in a single simultaneous verdict, necessarily, a juror, having bias as to punishment, is biased as to guilt. This thesis we reject; and as we

later note, even if jury sentencing is established, there are alternatives to the single verdict system when the result thereof is to deny a constitutional right.

In reaching a conclusion opposite to the one reached in *Puff*, we recognize that *Puff* has been uniformly followed by other courts, both state and federal. See, *e.g.*, *Pope* v. *United States*, 372 F.2d 710 (8 Cir. 1967); *Turberville* v. *United States*, 303 F.2d 411 (D.C. Cir.), *cert. den.*, 370 U. S. 946 (1962);[10] *Commonwealth* v. *Subilosky*, ... Mass. ....., 224 N.E.2d 197, 203 (1967); *State* v. *Laws*, 50 N. J. 159, 233 A.2d 633, 646 (1967).

The North Carolina Supreme Court has recently addressed itself to this problem, and held that the inability of a juror to join in a verdict *imposing the death penalty* is sufficient ground for disqualification from the jury which is to determine the defendant's guilt or innocence. *State* v. *Childs, supra*, 152 S.E.2d at 461. In other words, under current North Carolina practice a prospective juror with conscientious objections to capital punishment is automatically barred from jury service in a capital case, regardless of whether or not he would render a fair verdict on the issue of guilt alone. The same result was reached in *People* v. *Riser*, 47 Cal.2d 566, 305 P.2d 1 (1957), where the facts placed the issue in particularly clear focus. In that case, a challenge for cause was sustained when the prospective juror stated on *voir dire* that he was against capital punishment, that in no event would he join in a

[10] At this point it should be noticed that the prosecution in *Turberville* occurred under the District of Columbia statutes at a time that capital punishment was mandatory. D.C. Code § 22-2404 (1961 Ed). Statements in the case contrary to our holding here are thus dicta.

verdict imposing the death penalty, but that his objection would not preclude him from finding the defendant guilty.[11]

Many of the authorities cited above have been primarily concerned with statutory interpretation of state laws relevant to the question of whether disqualification of a juror on the ground of conscientious objection to capital punishment has been impliedly revoked by the abolishment of a mandatory death sentence under certain circumstances. However, to the extent that these authorities stand for the proposition that a prospective juror in a capital case may be constitutionally disqualified simply for holding sentiments against capital punishment where death is not the only punishment and where the effect of juror disqualification is to eliminate a substantial portion of the jury venire, we reject them, also.[12]

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[11] California has adhered to the *Riser* holding, even after the enactment by statute of a two-trial procedure in capital cases. See, *e. g., People* v. *Gilbert,* 63 Cal.2d 690, 408 P.2d 365 (1965). It has not yet been decided in New York, which adopted a statutory two-trial procedure like California's, whether the cases which arose prior to the enactment of the statute and which held that conscientious objections to capital punishment are a *per se* disqualification in a capital case, see, *e. g., People* v. *Fernandez,* 301 N.Y. 302, 320-21, 93 N.E.2d 859 (1950), are still valid. It has been suggested that the establishment of the two-trial system should remove this ground for disqualification if the prospective juror would nevertheless be able to join in a guilty verdict. See Note, 39 N.Y.U.L. Rev. 50. In our view, such a result may be constitutionally compelled, depending upon the substantiality in the number of disqualifications which result from a contrary rule.

[12] Further, we reject the argument in *Turberville,* adopted in *Pope,* that our inquiry is at an end if we find no systematic exclusion in the general venire because the guaranty against systematic exclusion does not extend to the selection of a particular jury panel. We do not quarrel with the general proposition that a defendant does not

Among the states, there is wide debate as to the abolition or retention of the death penalty.[13] Divers states have resolved the problem in diverse ways, from outright or partial abolition of capital punishment to a system whereby a jury may fix or recommend imposition or non-imposition of capital punishment. We do not enter into the merits of this controversy. Within the framework of the Federal and State Constitutions, the propriety of capital punishment, and when it is to be imposed, are questions reserved for legislative judgment, and the questions are not judicial unless some constitutional guaranty is violated. Nor do we intimate that persons who believe that capital punishment has its function and place are or are not more easily persuaded of guilt—more "conviction-prone"—than those who oppose it. The Second, Eighth and District of Columbia Circuits and the North Carolina Supreme Court have rejected the due process argument that a defendant is prejudiced by being subjected to a trial before a jury, all the members of which do not believe in the abolition of capital

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have the right to have every element of the community represented on the jury which tries him. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946). But under the practice existing in North Carolina, as freely conceded by its counsel, jurors expressing any conscientious scruple against capital punishment are as surely and certainly excluded from any panel serving in such a case as if they had been excluded from membership on the venire. Where inevitably such jurors will be excused from petit jury service, it is no answer to say that petitioner's rights were not violated because they were members of the array from which the jury to try him was chosen.

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[13] *The Challenge of Crime in a Free Society*, p. 143, op. ft. 4, *Task Force Report*: *The Courts*, p. 27, op. ft. 4.

punishment.[14] We, believing that it is unnecessary to a proper disposition of this case, do not consider it.

Where we depart from prior decisions is that we do hold that belief against capital punishment on the part of jurors who are vested with a dichotomy of functions—the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed—cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws.

We need not look far for support for the principle that systematic exclusion of any recognizable, identifiable group within the community from which a jury venire is drawn violates the equal protection clause, irrespective of a showing of prejudice. Systematic exclusion, as an invidious practice, has most usually been stricken down where exclusion was based on color, *e.g.*, *Smith* v. *State of Texas*, 311 U. S. 128 (1940); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964); *Chesnut* v. *New York*, 370 F.2d 1, 7 (2 Cir. 1966); sex, *Glasser* v. *United States*, 315 U. S. 60 (1940); *Ballard* v. *United States*, 329 U. S. 187 (1946); economic status,

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[14] *United States* v. *Puff*, *supra*; *Pope* v. *United States*, *supra*; *Turberville* v. *United States*, *supra*; *State* v. *Childs*, *supra*. Contra: Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 Tex. L. R. 545 (1961).

Thiel v. *Southern Pacific Co.*, 328 U. S. 217 (1946); *Labat* v. *Bennett*, 365 F.2d 698, 719-24 (5 Cir. 1965); or national origin, *Hernandez* v. *Texas*, 347 U. S. (1954). See also, *Fay* v. *New York*, 332 U.S. 261 (1947) (dissenting opinion), which would have disapproved the use of "blue ribbon" juries. The thrust and breadth of the statements employed in condemning these obvious forms of exclusion in some of these cases are worthy of examination in testing the validity of the practice followed in the case at bar, as measured by its result.

In *Glasser*, there was exclusion of women from the grand jury and alleged exclusion of certain women, from the petit jury. Although the conviction was not set aside for either exclusion (because, as to the grand jury, women had been eligible to serve as jurors for only two months at the time the indictment was returned and because, as to the petit jury, there was a failure of proof), the Court made the following significant statement in regard to the composition of a jury:

> "For the mechanics of trial by jury we revert to the common law as it existed in this country and in England when the Constitution was adopted. Patton v. United States, 281 US 276, 74 L ed 854, 50 S Ct 253, 70 ALR 263. But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' Smith v. Texas, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164.

"Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code, §§ 275, 276; 28 USCA §§ 411, 412. This duty of selection may not be delegated. United States v. Murphy (DC) 224 F 554; Re Special Grand Jury (DC) 50 F(2d) 973. And, its exercise must always accord with the fact that the proper functioning of the jury system, and indeed, our democracy itself, *requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class.* If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But *they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.*" (Emphasis supplied) *Id.*, pp. 85-86.

Ballard also concerned exclusion of women from the grand jury which indicted the defendants and the petit jury which found them guilty. On this ground the defendants' convictions were reversed, with the Court saying:

"It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. *Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class.* But, if the shoe were on the

other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? *The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.* To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." (Emphasis supplied) *Id.*, pp. 193-194.

Thiel was a case in which the exclusion was based on economic grounds. Persons who worked for a daily wage were not listed as prospective jurors, as a class, because it was thought jury service imposed a financial hardship on them and experience demonstrated that they were usually reluctant to serve and, accordingly, were excused by the trial judge. The case was a civil suit for money damages and the jury returned a defendant's verdict. A new trial was ordered because of the " * * * admitted wholesale exclusion of a large number of wage earners in disregard of the high standards of jury selection." *Id.*, p. 225.

In commenting on the proper composition of a panel from which a jury is drawn, the Court said:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, *necessarily contemplates an impartial jury drawn from a cross-section of the community.* Smith v. Texas, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164; Glasser v. United States, 315 US 60, 85, 86 L ed 680, 707, 62 S Ct 457. This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups

of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." (emphasis supplied) *Id.*, p. 220.

Of course, the *Glasser*, *Thiel* and *Ballard* cases were decided under the supervisory power of the Supreme Court of the United States over lower federal courts and not avowedly as an announcement of constitutional doctrine. They are, nevertheless, pertinent authorities on the constitutional issue, because each depended upon the authority of *Smith* v. *State of Texas, supra,* a decision resting solely on constitutional principles, as authority for the result reached and, over the years, they have generally been so regarded. See, *e. g., Brooks* v. *Beto, supra,* p. 11.

North Carolina's practice of excluding persons from the jury selected to determine an accused's guilt or innocence, merely because they have some sentiment or reservation against capital punishment, without any determination that their beliefs would affect their ability to decide the issue of culpability, cannot stand under these Supreme Court decisions condemning systematic exclusion.[14a] In this case,

[14a] Explicit and implicit in the separate concurrence of Judge Sobeloff is the argument that petitioner lacks standing to claim a denial of equal protection except as a denial of equal protection mounts up to a denial of due process. It would be shocking to suppose that petitioner is not opposed to capital punishment, at

we are told by the representatives of the Attorney General of North Carolina that 30% of any array of veniremen

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least for himself. More importantly, he, as a defendant in a capital case, has been denied equal treatment with that afforded defendants in non-capital cases who are not tried by juries selected in part by the jurors' notions of punishment; and, as this opinion demonstrates, there is no proper basis for having a death-qualified jury try the issue of his guilt or innocence. Thus, on two scores, he is a member of a class which has been unconstitutionally discriminated against.

Moreover, in such cases as this traditional restrictive rules as to standing are on the wane, if indeed they are still viable. In *Glasser* v. *United States, supra,* the standing of a male defendant to challenge exclusion of women was not questioned; and in *Ballard* v. *United States, supra,* the conviction of a male defendant was reversed because of the exclusion of women. In *Rabinowitz* v. *United States,* 366 F.2d 34 (5 Cir. 1966), the conviction of a white defendant was reversed because of the manner of selection of grand and petit juries which operated to exclude Negroes. Admittedly, these decisions did not proceed on constitutional grounds, but the majority opinion in *Fay* v. *New York, supra,* which did proceed on constitutional grounds, recognized that "[T]here may be special cases" [332 U.S. 293] where a defendant who is a member of a class not excluded may complain of the exclusion of a class to which he does not belong. A defendant in a capital case would seem to present such a "special case." *Allen* v. *State,* 110 Ga. App. 56, 137 S.E.2d 711 (1964), and *State* v. *Madison,* 240 Md. 265, 213 A.2d 880 (1965), both cited with approval in *Labat* v. *Bennett, supra,* pp. 723-724, reject the traditional requirement of standing. The note, *The Defendant's Challenge To a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection,* 74 Yale L. J. 919, 931-941 (1965), suggests that discretionary application of the principle of *jus tertii* or "impure standing" may be invoked in appropriate cases as an alternative to a requirement of "pure standing," even if the main thesis of the author that racial exclusionary jury cases should be grounded on the due process clause, rather than the equal protection clause, is rejected. The facts before us would lead us to conclude that the instant case is an appropriate one in which *jus tertii* standing should be invoked. All of these reasons lead us to conclude that petitioner has standing.

truly representative of the North Carolina community would be ineligible to serve in a capital case, because they have conscientious scruples against capital punishment and because, under North Carolina practice, they would be excused from service for cause. Indeed, in the instant case 45.33% of the prospective jurors were disqualified on this ground. We do not know the color, or the sex, or the economic status of those who would be disqualified, or those remaining who would be considered qualified. We do not, and need not, know that in determining guilt or innocence they would act as a class. *Ballard* v. *United States, supra.* We know only that such a substantial percentage of the populace generally is different from the remaining populace in having a different basic concept of punishment in even the most heinous crimes which may stem, as pointed out in *Turberville* v. *United States, supra,* from divers and diverse reasons, from unshakable religious convictions to intellectual or philosophical distaste. Such a group would comprise a variety of views and a variety of approaches and, if allowed to serve, may well have a "subtle interplay of influence" upon the others. *Ballard* v. *United States, supra,* p. 194. As a group it would seem as readily identifiable as the wage earners in *Thiel* v. *Southern Pacific Co., supra.*

The exclusion of all persons from the jury in a capital case who hold conscientious objections to capital punishment cannot be justified on the ground that it is necessary for the effectuation of the interest of an accused and the interest of society in having a fair and impartial jury determine the guilt or inpocence of the accused on the facts as presented to them, and who are not influenced in their judgment by extraneous beliefs regarding one of the possible punishments which might be imposed. There, of course, can be no doubt as to the legitimacy of this interest.

But it can be served by the exclusion of a much narrower group than that which was excluded in the instant case—the exclusion of only those whose beliefs would impair their impartiality in determining guilt aside from the question of punishment. It is precisely for this reason that the *voir dire* inquiry should not cease after a determination that the prospective juror is opposed to capital punishment, but should further ascertain whether this opposition would preclude him from making a fair determination on the issue of guilt.

If a prospective juror's conscientious objection to one of the forms of punishment which the statute allows are so severe as to render him unable to participate, with an open mind, in the jury's deliberations on the culpability of the accused, he is properly challengeable — and should be challenged — for cause. He has demonstrated that he is not an impartial, "indifferent" juror. On the other hand, if a prospective juror with conscientious objections can, in spite of these objections, make an impartial determination on the issue of guilt, his exclusion, if the class to which he belongs become substantial, works to deny to the defendant his right to have his case judged by a jury representative of the community without serving any recognizable, legitimate interest of the state. Objections to capital punishment may be based on many different stages of belief, and involve subtle nuances of conscience. The function of *voir dire* should be to explore these nuances to determine whether the prospective juror would be able to participate fairly in the deliberations on the issue of guilt, confining his judgment to the facts as presented. Under the equal protection clause, *voir dire* cannot be a blunt instrument of systematic exclusion of a widespread segment of the community whose views do not interfere with the interest which the state seeks to protect.

It is clear that the real interest which the state is seeking to protect by the *voir dire* practice followed in the instant case is the preservation of capital punishment, as one possible punishment, though not exclusive. This interest provides no firmer justification for the systematic exclusion of a substantial portion of the community from a jury determining the defendant's guilt or innocence. Again, we do not question the legitimacy of this interest, and we do not doubt that permitting persons with conscientious objections to capital punishment to sit on a jury which is both to determine the guilt or innocence of the defendant and to impose his punishment in a capital case may result in some cases in effective nullification of the death penalty. We are also aware of the danger that if jurors, while agreeing upon the guilt of the defendant, adopt intransigent positions on the issue of punishment, no verdict on either guilt or punishment will be returned since a single verdict is required under North Carolina law, and that this might "result in practical immunity from murder" if occurring in successive trials, *United States* v. *Puff, supra.* But, the state has *no* constitutional right to the imposition of capital punishment in any case; and a defendant *has* a constitutional protection against systematic exclusion. Moreover, the state's non-constitutional interest can be served by more narrow measures than the systematic exclusion of a large segment of the community from serving on a jury which is to determine the guilt or innocence of the defendant, and thus such exclusion cannot be deemed necessary to effectuate a valid state interest so as to save it under the equal protection clause.

Other states have awarded or dealt with the problem in other ways. In a minority of the states the problem would not arise because the sentencing function is vested solely in the judge. In the majority of the states, the

jury is empowered to recommend or fix punishment in capital cases.[15] Of these California, Connecticut, New York and Pennsylvania have a two-trial system which permits a second jury to pass on sentence and a first jury to return only a verdict of guilt if the first jury is in disagreement as to punishment.[16] The drafters of the Model Penal Code also recommend that guilt and punishment of a defendant be determined in separate proceedings.[17]

As our disapproval of relevant California decisions indicates, we think that a two-trial system is not immune to constitutional attack, if under it are sustained challenges for cause of substantial numbers of prospective jurors in the guilt phase of the proceedings on the sole ground that they have objections to capital punishment without the further determination being made that these objections would interfere with their determination of the defendant's guilt or innocence. However, a two-trial system does provide a practicable means to accommodate the interests of the state in preventing hung juries in successive trials because the original jury cannot agree upon punishment and in preserving the possibility that the death penalty will be imposed. Under such a system, the defendant can be assured that only those persons whose adherence to their conscientious objections to capital punishment is so rigid as to preclude them from making an impartial determination of his guilt or innocence will be subject to a challenge for cause, while the state is simultaneously as-

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[15] *Task Force Report: The Courts*, 26 op. ft. 4.

[16] Cal. Penal Code § 190.1; Conn. Gen. Stat. Ann. § 53-10; N. Y. Penal Code § 125.35; Penn. Stat. Ann. § 4701.

[17] Model Penal Code, § 201.6 (Prop. Final Draft 1962); See also, Tent. Draft No. 9 (1959).

sured that, if a jury is called for the sole purpose of determining the defendant's punishment, it will be composed only of those persons whose consciences permit them to impose the whole gamut of punishments allowed by statute and that in no event will a guilty verdict unanimously agreed upon be lost by disagreement as to the appropriate punishment.

Under our view of how the existing North Carolina procedure and practice must be accommodated to a defendant's constitutional rights, prosecutors in that state must run the risk that a person who has conscientious objections to capital punishment will either successfully persuade his fellow-jurors that the death penalty should not be imposed on the defendant whose case is being tried or that he will cause the jury to disagree because of disagreement on the issue of punishment, although agreeing on the defendant's guilt. This is so because North Carolina's resolution of the conflict of the interest of the prosecutor in obtaining a jury which is free to sentence the defendant in any manner which the statute allows and petitioner's right to trial by a representative jury by making the state's interest wholly paramount cannot stand under the equal protection clause.

The district judge should issue the writ, staying its effect for a reasonable time, to permit the state to retry the petitioner.

REVERSED and REMANDED.

SOBELOFF, Circuit Judge, concurring specially:

Following a somewhat different route, I concur in the result reached by the court and in most of its opinion. The extent of my disagreement is briefly indicated below.

I find it unnecessary to enter into the discussion between my brethren Winter and Craven as to whether the State has a sufficient interest in the preservation of the death sentence as a possible punishment to permit it to submit the *penalty* issue to a jury composed only of persons having no scruples against capital punishment. Without addressing this interesting but secondary question, I conclude that there has been a violation of the Fourteenth Amendment in this case simply because the issue of *guilt or innocence* was submitted to a jury under the trial court's rulings which systematically excluded for cause every juror entertaining any scruples about capital punishment, and this without even inquiring whether these beliefs would preclude a fair consideration of the guilt issue. I agree that the conviction must be set aside because of the palpably unfair double standard of inquiry which excluded all with any degree of principle against the death penalty while seating one who admitted a bias against the defendant and another who felt that he would be under a mandate to impose the death penalty if the defendant should be convicted. This is the most obvious fault of the trial. But in addition, the procedure was constitutionally defective in the manner in which the list of prospective jurors was systematically combed with the result that the issue of innocence or guilt was tried before a "death qualified" jury.

However, I have conceptual difficulty with the theoretical footing chosen by the major opinion for invalidating the procedure which resulted in a "death qualified" jury for the determination of guilt as well as punishment. My concern is with the court's refusal to consider the due

process argument while placing exclusive reliance on the equal protection clause. I agree unreservedly with Judge Craven that it is due process which forbids the practice employed here.

The underlying idea in all of the jury selection cases relied upon in the major opinion is that the fairness of the trial was impaired by the deliberate empaneling of a jury not truly representative of a cross-section of the community. To my mind, this is essentially a due process concept expressing the Constitution's interdiction of invidious discrimination in the method of jury selection. See *Smith* v. *State of Texas,* 311 U.S. 128, 130 (1940). The inherent objection to the exclusion of prospective jurors on account of race, sex, religion, philosophic belief or economic condition is that it opens the way to a fact finder's partiality, bias and unfairness, which are often difficult to demonstrate in a particular case. These exclusions go to "the very integrity of the fact-finding process"[1] which depends on the presence of an impartial jury truly representative of a cross-section of the community. If this basic condition of representativeness is violated, due process is denied; and such an exclusion has been held reversible error without a showing of prejudice in the particular case. See *Labat* v. *Bennett,* 365 F.2d 698, 723 (5th Cir. 1966). If a venire list has been so manipulated as to become unrepresentative, it cannot be defended as measuring up to minimum constitutional standards of due process. After all, due proeess is simply the legal expression denoting fairness and we are agreed that making the selection from an unrepresentative list is not fair.

It is difficult to escape the conclusion that the automatic disqualification of from 30% to 45% of the available jurors in capital cases destroys the representative character of

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[1] *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965).

the jury. That the submission of the question of guilt to the special group which remains after the siphoning process has a tendency to favor the prosecution has been affirmed by legal scholars and psychologists.[2] Even though the major opinion refuses to accept these studies, it recognizes that the excluded group, if allowed to serve, "may well have a 'subtle interplay of influence' upon the others." This is enough, for the due process claim stands upon the unrepresentative character of the list, and it is unnecessary to speculate as to the effect this particular group might have if permitted to participate. *Ballard* v. *United States*, 329 U.S. 187 (1946).

Nevertheless, the major opinion prefers to rely solely on the equal protection clause of the Fourteenth Amendment. It is true, as the opinion notes, that decisions pertaining to the systematic exclusion of jurors are usually

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[2] The conclusion of these scholars is best summarized by Professor Walter E. Oberer in his article, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?", 39 Tex. L. Rev. 545, 549 (1961):

> "The consequence [of excluding jurors with scruples about capital punishment] is that a jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members. Human sympathy is hardly subject to nice compartmentalization. Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach."

See also Adorno, "The Authoritarian Personality" (1950); Goldberg, "Attitude Toward Capital Punishment and Behavior as A Juror In Simulated Capital Cases" (1965) (unpublished study reproduced in petitioner's brief at App. 60 filed in the United States Supreme Court in *Witherspoon* v. *State of Illinois, et al.*, ... U.S. ..... (1968)); Wilson, "Belief in Capital Punishment and Jury Performance" (1964) (unpublished study reproduced in petitioner's brief at App. 66 filed in the United States Supreme Court in *Witherspoon* v. *State of Illinois, et al.*, ... U.S. ..... (1968)).

couched in equal protection terms. This is because in each of the cases resting on this ground the practice complained of worked to discriminate directly against a particular class to which defendant belonged or with which he was affiliated. An example is the *Smith* case, *supra*, where a Negro defendant was tried before a jury from which members of his race were systematically excluded while the State tried white defendants without excluding from the jury members of their race. Thus individuals similarly situated were treated discriminatorily by the State, and the equal protection clause was appropriately invoked, without any negative implication as to the applicability of the due process clause. In *Eubanks* v. *Louisiana*, 356 U.S. 584, 585 (1961), the Supreme Court synthesized the equal protection jury exclusion cases in these measured words: "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of *his* race have been excluded because of *their* race." (Emphasis added.)

In the instant case, the record fails to establish that the defendant, accused of murder, is a member of the class—persons with scruples against capital punishment—which the text of the major opinion clearly holds was accorded discriminatory treatment by the State. To say that the defendant has scruples against capital punishment as to himself fails to distinguish him from any of the jurors who actually tried him or from mankind in general. Because of their beliefs, otherwise qualified members of the excluded class, unlike individuals from other segments of society were denied the opportunity to adjudicate the guilt or innocence of defendants in capital cases. This is not to say,

however, that the defendant has no standing to complain,[3] for denial of equal protection to the excluded class operates to deny him due process by forcing him to trial by a jury chosen from an unrepresentative cross-section of the community. It is only from this perspective that the case may be viewed as one involving a denial of equal protection. The denial of equal treatment to this identifiable group was an integral part of the judicial proceedings which culminated in defendant's conviction. By so demeaning the criminal process, one might contend, the State has violated the defendant's right to due process, "regardless of whom the unconstitutional state conduct may have affected in the first instance." *The Defendant's Challenge To A Racial Criterion In Jury Selection: A Study in Standing, Due Process and Equal Protection,* 74 Yale L.J. 919, 940, & n. 106, pp. 939-40 (1965). In this limited sense, equal protection and due process may be said to coalesce in this case. But again, the ultimate ground for reversing the conviction would be due process.

If the class excluded be persons with scruples against capital punishment, equal protection alone cannot provide an adequate ground for decision. In every one of the decided cases which grants standing to a person not within the excluded class, the courts speak either not at all of equal protection, or of equal protection coupled with due process; none relies exclusively on equal protection. In *Allen v. State, supra,* a case involving a white civil rights worker tried before a jury from which Negroes were sys-

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[3] See *Ballard* v. *United States,* 329 U.S. 187 (1946); *Rabinowitz* v. *United States,* 366 F.2d 34, 37 & n. 1 (5th Cir. 1966); *Allen* v. *State,* 137 S.E.2d 711, 714 (Ga. 1964); *State* v. *Madison,* 213 A.2d 880 (Md. 1965).

tematically excluded, the Georgia court unequivocally stated: "When a State law provides for indictment and trial by a jury, *due process of law,* in our opinion, includes indictment and trial by juries selected in accordance with the established law, from a list of citizens representing a cross-section of the community." (Emphasis added.)

In a footnote, in apparent departure from the theory of the text, the major opinion suggests that the class involved in this case is capital criminal defendants. The view seems to be that persons charged with capital offenses are treated inequitably compared to those accused of non-capital offenses who are tried before jurors unquestioned about their opinions of punishment. While this suggestion is decidedly unpersuasive, it in no way militates against the use of the due-process clause in this case. Due process and equal protection are not mutually exclusive or conflicting to any extent. I read due process as being the broader guarantee of fundamental fairness. For this reason, I cannot envision a mode of jury selection involving an infraction of equal protection that might possibly satisfy the demand of due process.

In addition to due process, there is yet another constitutional basis which supports the court's conclusion. In my view, not only were both due process and equal protection rights under the Fourteenth Amendment infringed, but no less emphatically the defendant's Sixth Amendment guarantee of trial by an impartial jury was violated. This guarantee applies to the states, *Parker* v. *Gladding,* 385 U.S. 363, 364 (1966). A jury is not an impartial one if it has been deliberately drawn from a restricted segment of the population that may reasonably be thought more "guilt oriented" than a random cross-section of the general community.

To this defendant, of course, it matters not at all which ground we rely upon in voiding his trial; the court, however, has a deeper and more enduring concern with relevant legal theory, and it should select the appropriate avenue to decision.

CRAVEN, Circuit Judge, concurring:

I readily concur in the decision of the court. I would go further and reject the court's premise that the state has a legitimate interest in obtaining the death penalty. There is no such state interest and there has not been since the 1949 statute left choice of punishment to the "unbridled" discretion of the jury. With that statutory change of direction the state relinquished its so-called legitimate interest in the death penalty in favor of obtaining *either* death or life imprisonment as equally appropriate punishments. Since either is appropriate, the state has no legitimate interest in the selection of a jury predisposed to either one.

That the jury choice is "unbridled" means only that the jury need not articulate or even consciously have a reason. Certainly it does not mean that jurors are not to reason together on the question of punishment as on all others. I cannot think of a better reason for a recommendation of life imprisonment than questioning the wisdom of capital punishment—whether on religious or other grounds. To rule out such a reason by systematic exclusion of the doubters results in an "unbridled" choice by a death-oriented jury. Any method of jury selection which systematically deprives the accused of cross-sectional community representation violates due process. "The end in view," as Chief Justice Stacy put it for the North Carolina Supreme Court, "is to get a fair cross-section of community judgment." *State* v. *Koritz*, 227 N.C. 552, 43 S.E. 2d 77, 81 (1947).

It is obvious that there is no such cross-section in a system where 30 percent to 45 percent of otherwise qualified jurors are excluded because their viewpoint on a question within their unbridled discretion is not pleasing to the prosecution. To select a particular attitude of mind or heart—whether for or against the death penalty—and upon it to erect an exclusionary rule for the selection of jurors in either the guilt or punishment phase of the trial is, in my opinion, fundamentally opposed to the concept of trial by jury and due process.

I would prefer to rest the decision upon denial of due process and infringement of the right to trial by jury rather than denial of equal protection, and I would hold that the defendant is entitled to a jury that has not been screened to avoid the exercise of a fair cross-section of community judgment and that this right applies to the determination of both guilt and punishment.

HAYNSWORTH, Chief Judge, concurring in result:

As Judge Bryan, I concur in the result, but I do so upon the very limited ground of the essential unfairness of excluding every juror who professed an unexamined scruple against capital punishment while seating every juror who professed a belief in capital punishment, including one who stated a belief that he was under a duty to vote for the death penalty in any case of murder. It is enough for me that the *voir dire* inquiry was far from even-handed and that many jurors, whom we would all agree were qualified were excused for cause. I do not think this record presents any broader question or that it is appropriate for a declaration of new and sweeping constitutional principles.

On this point, the *voir dire* examination of each juror in this case opened with the question, "Do you believe in capital punishment?" If the answer was "No," he was asked a second question, typically, "You have conscientious scruples against it do you?" If the answer to the second question was "Yes," as it predictably was, without any further inquiry and no probing whatever, the court excused the juror for cause. The procedure was in strong contrast to the probing of the juror who reported that he had read of the case in the newspapers and had formed a fixed opinion. He was seated after agreeing that he could eliminate his fixed opinion from his mind and decide the case on the evidence.

It seems clear to me that among the thirty-four jurors excused for cause on this ground there were many who had no more than a philosophical or intellectual antipathy to capital punishment. A large segment of the population today has such an antipathy, in varying degrees, including those who think a death sentence appropriate only in such extraordinary cases as murder committed under aggravated circumstances by a prisoner already under a sentence of life imprisonment for whom the threat of a second sentence of imprisonment would be no great deterrent.[1] There is certainly no showing here that such persons could not subordinate their personal beliefs and follow the court's instructions in considering the guilt or innocence of the defendant and, under North Carolina's practice, approach the question of punishment with a reasonable degree of open-mindedness.

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[1] There is nothing new in such antipathy. It has been responsible for the very substantial progress we have made in the last two centuries from a system in which the death penalty was imposed for most felonies.

Surely a state in a capital case is not entitled to a jury composed exclusively of the most bloodthirsty of her citizens, and differences in shades of opinion about the appropriateness of capital punishment in particular cases ought not to be allowed as the basis of distinctions affecting the qualification of jurors.

I strongly suspect, too, that among the thirty-four jurors, there were some, or perhaps many, who had not so much as an intellectual antipathy to capital punishment in some classes of capital cases. When it was repeatedly demonstrated to all members of the venire that one could be excused by giving two simple and pat answers to two simple questions, strong temptation was placed before those members who had important business to attend or golf games to play or who, for other reasons, were loath to serve.

There remains the possibility that there were some among the thirty-four jurors who were excused who had such deep-seated notions with religious, moral or philosophical foundations that they could not act impartially in considering the question of guilt or the question of punishment. It is only a possibility, however, for this record shows us nothing, and their number is surely relevant to the broad Fourteenth Amendment issues the court undertakes to decide.

Nor can I find any basis for speculation that some jurors holding unshakable convictions against capital punishment might nevertheless have a substantial capacity for impartial service on the question of guilt or innocence though not on the question of punishment. Usually, the two questions are inextricably intertwined. North Carolina's particular practice may be unusual, but it is not essentially different from the prevalent practice which attributes a binding effect to a jury's recommendation of mercy. Even

in a jurisdiction in which the jury's function ends with a finding of guilt or innocence, a juror inflexibly opposed to capital punishment, knowing that the judge, or another jury, is likely to, or even may, impose the death penalty upon a verdict of guilty is very likely to equate a verdict of guilty with a sentence of death. Such a juror will hold out for a verdict of guilt of a lesser offense which does not permit a death sentence. Certainly the record furnishes no basis for a conclusion that there is any substantial number of people in North Carolina or anywhere else who would be capable of impartial service on the question of guilt in a capital case though admittedly incapable of such impartial service on the question of punishment.

Our speculation is a slender reed, indeed, to support the imposition upon the states, and United States District Courts too,[2] of the extraordinary requirement of bifurcated trials in capital cases. Really what the majority requires is two full trials if the first results in a verdict of guilty, for the second jury can hardly decide the question of punishment without being fully informed of all of the circumstances of the crime, the defendant's defenses and his mental and emotional condition, everything, in short, developed at the first trial.[3]

If the record disclosed the fact, one which seems to me most improbable, that a substantial number of the jurors

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[2] Under 18 U.S.C.A. § 1111, the penalty for murder in the first degree within federal jurisdiction is death unless the jury qualifies its verdict with the words "without capital punishment," in which event the penalty is life imprisonment. A federal jury thus determines the punishment as does a North Carolina jury.

[3] They should have a great deal more, particularly the kind of information of which a judge may avail himself through a presentence report.

excused held such firm convictions against the imposition of the death sentence as to be disqualified from service on the question of punishment and yet were capable of impartial service on the question of guilt or innocence, we would be met with the question the majority undertakes to resolve. When the record fails to reveal a single juror who could be so classified, I think we far exceed our judicial function in deciding a question which a different record conceivably might present. Deciding hypothetical issues is bad enough when the only consequences are felt in the immediate litigation; it is quite intolerable, to my mind, when it imposes far-reaching and extremely costly consequences in the general administration of criminal justice.[4] If the unlikely question ever is presented to a court, it will be time enough to face it then.

Because the state judge did not follow the even-handed approach approved in such cases as *Pope* v. *United States*, 8 Cir., 372 F.2d 710,[5] I concur in the result. I do not think any other question is presented on this record, and I think the court makes a grave mistake in undertaking to decide any other question.

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[4] Our judicial systems for the administration of criminal justice are suffering great stresses now as a result of assumptions of ever-increasing burdens. Ways must be found to shoulder those additional burdens which are necessary, but the needless imposition of very weighty and costly additional burdens cannot be afforded.

[5] It appears in that case that ten jurors were excused after acknowledging such deep-seated scruples against capital punishment as to prevent them from imposing it even though they conscientiously thought such punishment proper under the law and on the evidence. On the other hand, three other jurors were excused after indicating they thought the death penalty should be imposed upon one who committed a homicide in the course of a bank robbery regardless of the circumstances as disclosed by evidence.

I am authorized by Judge Bryan to say that he joins in this opinion.

BOREMAN, Circuit Judge, joining with Chief Judge Haynsworth in concurring in result:

I, too concur in the result reached by the majority insofar as the conviction is set aside and the opportunity is provided for the state to retry the petitioner. I readily join with Chief Judge Haynsworth in his separate statement of concurrence in the result which I adopt.

I would emphasize the thought that the court exceeds its judicial function in unnecessarily deciding a question which is not presented by the present record and I echo Judge Haynsworth's observation that the decision of the majority "imposes far-reaching and extremely costly consequences in the general administration of criminal justice. If the unlikely question ever is presented to a court, it will be time enough to face it then."

ALBERT V. BRYAN, Circuit Judge, concurring in result, but dissenting from the reason, of the decision.

I agree with reversal of the judgment on review, but I disagree with the majority's decisional premise: the successful challenge by the State of veniremen who were opposed to capital punishment. In my view no clause in the Constitution forecloses this judicial practice by North Carolina.

Staunch precedent for this conclusion is found in the cases cited but discarded by the majority. *E.g.*: *Pope* v. *United States*, 372 F2d 710 (8 Cir. 1967); *Turberville* v. *United States*, 303 F2d 411 (D.C. Cir. 1962), cert. den. 370 US 946; *United States* v. *Puff*, 211 F2d 171, 182 (2 Cir. 1954), cert. den. 347 US 963. A few quotations from them will, I think, demonstrate the soundness of their holdings.

Puff, supra, was decided in 1954 under the present Federal murder statute, 18 USC 1111. To sustain its view that the exclusion of veniremen for convictions opposing capital punishment, the Court, in *Puff,* quoted from *Logan* v. *United States,* 144 US 263, 298 (1892) as follows:

> "As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on *voir dire* that they had 'conscientious scruples in regard to the infliction of the death penalty for crime' were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror. . . . And the principle has been applied to the very question now before us by Mr. Justice Story in *United States* v. *Cornell* [Fed. Cas. No. 14,868], 2 Mason, 91, 105, and by Mr. Justice Baldwin in *United States* v. *Wilson* [Fed. Cas. No. 16,730], Baldw. 78, 83, as well as by the courts of every state in which the question has arisen, and by express statute in many states."

Similarly, *Turberville, supra,* when passing upon the very question now before us reasoned in the tenor of *Puff,* and also said:

> "What [appellant] is really asserting is the right to have on the jury some who may be prejudiced in his favor—i.e., some who are opposed to one possible penalty with which he is faced. *We think he has no such constitutional right.* His right is to absolute impartiality." (Accent added.)

Pope, supra, fully approved the attitude of *Turberville* and *Puff,* with the following supplement:

> "The defense position comes down to a demand, not for an impartial jury which is neutral, but for something quite different, namely, a jury which includes

persons who are prejudiced against—and, also, possibly for—capital punishment.

"We are also not persuaded by the argument that the trial court's exclusion of these persons served improperly to produce a panel which was something less than representative of the community. In a narrow sense this might be said but one could say the same thing in the same sense when a court very properly asks those persons to step aside who are personally acquainted with counsel for the prosecution, or who cannot read, or who cannot understand the English language. To that extent the panel is always a little less than representative of the community as a whole. But this exclusion does not produce an unfair jury or an illegally unrepresentative one or one which is not impartial in the Sixth Amendment sense. . . ."

As did these Courts, I feel that this principle governs whether or not the statutes exact capital punishment mandatorily or allow an optional verdict of life imprisonment.

Epitomized, my thinking is that in a trial under a statute like the one now considered, the question of the penalty is by present law injected into the question of guilt, and the act's validity is not doubted by the Court. A juror cannot vote "guilty" without qualification. *Andres* v. *United States,* 333 US 740 (1948). Therefore, if his conscience will not permit him to cast a ballot for the extreme penalty, he would be prevented from unqualifiedly declaring his equally conscientious conviction of the accused's guilt. He must stand aside as unacceptable because, although convinced of guilt beyond a reasonable doubt, he could not so say unconditionally. The statute plainly requires that, if the jurymen determine the defendant to be guilty of a capital offense, they must announce either the death penalty or life imprisonment. A juryman who has scruples about taking the life of one he finds guilty of

committing a capital offense has not a freedom of choice between capital punishment and life imprisonment.

No Constitutional invalidity is raised against the statute, and I perceive no fundamental bar to the State's rejection as a juryman of a venireman conscience-bound against capital punishment. It is a perfectly understandable tenet and I imply no derision of the scruple. Nor do I intimate any view of the right or wrong of the death penalty. I say only that it is a question for determination by the State, not one for the Federal courts in passing upon State laws.

Reference is made by the majority to the percentage of persons in North Carolina averse to execution for crime. Granted the accuracy of these figures, I doubt the soundness of accepting the poll as representative of State or even community opinion. Rather I would look to the expressions of the North Carolina legislature in its enactments. The criminal statute here under study has remained the law of North Carolina for many years, and to me this is indicative of the public judgment of capital punishment. If the citizens of the State are unwilling to follow the statute, I have no doubt it would be promptly repealed or otherwise modified. Again, this action is not for the Federal courts.

However, I would reverse the conviction here for disallowance of the defense challenge to a venireman who held it his *duty* to inflict capital punishment should the defendant be found guilty of murder. *Cf. Stroud* v. *United States*, 251 US 15, 20 (1919); *United States* v. *Puff*, *supra*, 211 F2d 171, 182. Moreover, there was trial error in the admission of inflammatory evidence and advertence before the jury to the defendant's prior criminal record. These incidents necessitate a new trial, and for that reason I concur in the determination of the court to reverse.

SUPREME COURT U. S.

JUN 28 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois.

Respondents.

(On Writ of Certiorari to the Supreme Court of Illinois)

PETITION FOR REHEARING

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Respondents.

PETITION FOR REHEARING

I.

THE COURT SHOULD CHANGE ITS MANDATE FROM "REVERSED" TO "VACATED AND REMANDED" OR "REVERSED AND REMANDED."

Under Illinois law the word "Reversed" at the end of an opinion means that the judgment of conviction is reversed outright and the case is not remanded for further proceedings. People v. Martin, 380 Ill. 328, 340; 44 N.E. 2d 49, 54 (1942); People v. Gardner, 35 Ill. 2d 564, 573; 221

N.E. 2d 232, 237 (1966). Such a mandate has the effect of a complete discharge and operates to preclude additional proceedings. The same appears to be true under federal law. See Haynes v. United States, 390 U.S. 85, 101 (1968), Grosso v. United States, 390 U.S. 62, 71-72 (1968).

"Reversed" seems to be an appropriate mandate only when all further proceedings would inevitably result in a reversal of conviction. Grosso v. United States, 390 U.S. at 71, Haynes v. United States, 390 U.S. at 101. In some cases the word "Reversed" has been qualified by a preceding sentence to the effect that the case will be remanded for further proceedings consistent with the opinion. See United States v. Ballard, 322 U.S. 78, 88 (1944), United States v. Beach, 324 U.S. 193, 196 (1945); Gibson v. United States, 329 U.S. 338, 351, 361 (1946).

It is clear from n.21 of the Opinion that outright reversal of the conviction is not contemplated by the Court. The Court seems to envision a resentencing procedure if one can be devised in Illinois. Cases involving resentencing are usually reversed and remanded. Yasui v. United States, 321 U.S. 115, 117 (1943); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 481 (1947) (dissenting opinion). Even if the conviction itself were to fall the case should be reversed and remanded presumably for a new trial. Asheraft v. Tennessee, 322 U.S. 143, 156 (1944); 327 U.S. 274, 279 n.1 (1946); Mapp v. Ohio, 367 U.S. 643, 660 (1961). See Petr's. Br. p. 43. In this case in particular, the meaning of the word "Reversed" is unclear since what is involved is a collateral attack in a state court on a state conviction. Presumably it is only the denial of the state collateral remedy that is reversed. In that event the necessity of further proceedings is manifest and the case should be remanded.

Ordinarily cases are returned to the court to which certiorari was granted. And especially in cases where no guidance as to future proceedings is given the case should be returned to allow the State legislature or judiciary to devise some procedure if they can. See Note, 81 Harv. L. Rev. 1260, 1262 (1968). Of particular significance is the mandate issued in a prior Illinois case wherein this Court determined that Illinois law improperly restricted a poor person's right to appeal. There the remedy was to "vacate and remand" to allow Illinois to devise some means for satisfying its constitutional obligations. Griffin v. Illinois, 351 U.S. 12, 20 (1956). The same mandate is appropriate here if the Court fails to clarify the opinion or sanction a procedure for resentencing.

II.

THE COURT IMPROPERLY DECIDED THIS CASE ON A GROUND OUTSIDE THE SCOPE OF THE GRANT OF CERTIORARI UNDER CIRCUMSTANCES THAT MAY WELL BE SAID TO DEPRIVE THE RESPONDENTS OF FAIR NOTICE.

The principal ground of the opinion is that a jury composed solely of persons without conscientious scruples against punishment is unfair on the issue of punishment. In the Circuit Court of Cook County and in the Supreme Court of Illinois the petitioner raised no question as to the fairness of the jury on the issue of punishment, nor did he challenge the sufficiency of voir dire examination of jurors. Indeed, it would be fair to say that petitioner conceded the fairness of the jury on the issue of punishment and advanced an argument that the State's interest in getting a fair punishment jury should not interfere with the defendant's right to have a fair guilt jury, urging the in-

stitution of a judicial sentencing or bifurcated trial procedure. E.g. n.18 of the Opinion of this Court. Petr's. Br. p. 42-43.

The Petition for Certiorari did not raise any question of the fairness of the jury or punishment but merely asked if it were error to refuse to allow petitioner to introduce proof to support his allegations that the jury was unfair on the issue of guilt or innocence. Certiorari was granted and "limited" to the issue of jury fairness on the question of guilt or innocence. 389 U.S. 1035 (1968). This limitation was the Court's and not the respondent's. It was echoed in the grant of certiorari in Bumper v. North Carolina, 389 U.S. 1034 where the death penalty was not given.

The issue of jury fairness on punishment was first raised in a brief passage (pp. 33-36) in petitioner's opening brief, yet even in his opening brief, petitioner demanded only a new trial not a resentencing. (Petr's. Br. p. 43). The respondent Woods replied that the issue was not raised below and was outside the scope of the grant of certiorari and that it would not reply unless directed to do so by the Court. (Resp. Wood's Br. 37-38). Petitioner's reply brief closed with a brief paragraph reiterating the punishment argument (p. 45). The issue of punishment was not raised at oral argument.

For this Court to have decided this case on the issue it did is to violate rules of fair notice reiterated by this Court as recently as April, 1968. See In Re Ruffalo, —— U.S. ——; 88 Sup. Ct. 1222, a case involving far more adequate notice than that received by respondents herein. A decision on a ground not raised in the lower courts and far outside the grant of certiorari makes litigation in this Court a trap for the unwary ensnaring not only the litigants but the judges whose decisions are subject to review.

III.

THE COURT SHOULD RECONSIDER ITS DECISION ON THE MERITS AND ORDER BRIEFS AND ARGUMENT DIRECTED TO THE FAIRNESS OF THE JURY ON THE ISSUE OF PUNISHMENT.

The Court reached its decision that the jury was unfair on the question of sentence without the benefit of briefs or argument. We respectfully submit that this proposition is not so "self-evident" as to warrant the deprivation of respondent's day in court. Respondents should not be penalized for confining their argument to the limitations of the grant of certiorari.

A. The Proper Construction Of Discretion As To Penalty In A State Statute Is A State Matter And Presents No Constitutional Issue.

The basic premise of the Court's Opinion is its statement "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State . . ." (pp. 7-8). The respondents have two objections to the statement. First, it is overstated. Opposing and favoring capital punishment is not the same thing as having or not having conscientious scruples concerning capital punishment. The same polls which show that 42% of the population favor capital punishment also show that 65% of the population do not have scruples against capital punishment.[1] See Zeisel, Some Data on Juror Attitudes Toward Capital Punishment, p. 8.

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1. To the extent the Opinion is grounded on the result of polls it may have an ephemeral value. We doubt that a Gallup Poll conducted after recent assassinations would show that a minority of persons favor capital punishment.

Second, and more important, the nature and extent of the discretion to be exercised by the jury on the issue of punishment is one of state law. The Court seemingly recognizes that a State may impose a mandatory death penalty. But the Court asserts that "Illinois has attempted no such thing." p. 8, n. 15. With all due respect, the Court does not have the authority to say what Illinois has or has not done. Only the Supreme Court of Illinois has that right. Williams v. Oklahoma, 358 U.S. 576, 583 (1959). In Illinois the mandatory death penalty was abolished after the exclusion of scrupled persons from juries was incorporated into Illinois law. (Juror exclusion was sanctioned in 1853. Gates v. People, 14 Ill. 433. Jury discretion over the death penalty was adopted in 1867. Laws 1867, p. 90, § 1. In 1869 the juror exclusion rule was codified by statute. Laws 1869, p. 112, § 4.) The degree of discretion to be vested in the jury in Illinois is a matter of Illinois law upon which the Illinois Supreme Court should rule in the context of petitioner's argument. This argument concerning jury fairness on punishment in relation to jury discretion on punishment was not presented to the Illinois Supreme Court in this case and, at the very least, this Court should require an adjudication before making a ruling on an issue dependent totally upon a construction of state law.

In fact nearly every state Court has held that the discretion given to the jury is limited under state law to determination by juries without conscientious scruples against capital punishment. See Brief for Respondent Woods pp. 38-39, n. 12. In particular the New Jersey Supreme Court has held that the discretion vested by the Legislature in the jury is a discretion to be exercised on the basis of the evidence before it and not on the basis of pre-trial principles. State v. Reynolds, 43 N.J. 597, 602-

03, 206 A. 2d 750, 753 (1965) and this holding was given in the context of a state law which does not require that jurors be asked on voir dire if their scruples will influence their verdict. State v. Favorito, 115 N.J.L. 197, 199-201; 178 Atl. 765, 766-67 (1935). Even the Court in Crawford v. Bounds, hardly unsympathetic to petitioner's argument, recognized that part of the state law as to sentence in capital cases is the provision which prevents those who would rarely or never impose the death penalty from sitting in capital juries. See Petr's. Reply Br. Appendix pp. 9-10.

B. The Jury Was Not Unfair On The Issue Of Punishment.

The Court concludes that it is "self-evident" that the jury was not fair on the issue of punishment. To Oberer and McClelland it was "self-evident" that a verdict of guilty returned by a non-scrupled jury was constitutionally infirm. Yet this Court, after considering briefs and argument, determined that this latter proposition was not evident and had not been demonstrated. If anything, the record on the question of jury fairness on guilt is far more extensive than it is on the question of jury fairness on punishment.[2] Yet the Court refrains from deciding the first issue but pursues the second without briefs or argument.

The notion that persons without conscientious scruples against capital punishment constitutes a distinct and dwindling minority is based on a poll asking persons if they were "opposed" to capital punishment. The only poll dealing with conscientious scruples shows, however, that

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2. Only two of petitioner's studies purported to establish some relation between the existence of scruples and the assessment of punishment.

65% of Americans have no such scruples. Zeisel, op. cit, supra, p. 8. This is hardly a distinct and dwindling minority, and, of course, the substitution of public opinion polls to determine majority or minority positions is inconsistent with the notion of legislative determination by the elected representatives of the People.

The assertion that the jury was organized to return a verdict of death is rather unfair. In the five years from 1963 through 1967 in Cook County the State secured the death penalty in only nine cases out of twenty where the penalty was sought. And it must be clear that the prosecutors in Cook County have selected only the most aggravated cases in which to ask for the death penalty since the twenty capital cases were drawn from about eleven hundred murder indictments. These figures do not show the presence of jurors uncommonly willing to condemn a man to die.[3]

Finally, this Court should at least limit its holding to allow review on a case by case basis. The killing of a police officer acting in the line of duty under the circumstances of this case does not present a close question on the issue of punishment nor does the killing of a prison guard by a man under sentence for murder nor do numerous others. Surely these cases, where no reasonable argument against capital punishment can be made on the facts of the case, should not fall under the Court's ruling.

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3. The Court quotes with implicit approval Arthur Koestler's observation that those who would vote for capital punishment are without charity and fail to pass the test of humanity. P. 9, n. 17. Aside from the fact that this observation applies to a majority of the United States Congress and innumerable other respectable citizens we think the words of Mr. Justice Holmes in another context apply quite well to Mr. Koestler's book, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." Lockner v. New York, 198 U.S. 45, 75 (1905) (dissenting opinion).

C. The Argument Concerning Jury Fairness On Punishment Is Waived.

At the price of painful repetition, respondent notes again that the fairness of the jury on the issue of punishment and the sufficiency of questioning on voir dire were never raised until after the petitioner's Petition for Certiorari was granted. The Supreme Court of Illinois did not hear argument or decide the issue. In light of even the relatively brief summary of the litigation in this case in the Opinion of Mr. Justice Black (pp. 2-4) it is clear that petitioner had an inordinately large number of opportunities to raise any complaints about the fairness of the jury that fixed his punishment. Of course the rule of waiver has been ignored before but never in a case involving waiver at trial, on appeal, in at least three collateral proceedings including two appeals therefrom and a certiorari petition. Nor has waiver been ignored in a case where proof of guilt is not disputed and the sentence not unjust on the facts. In particular the failure to object at trial or to raise the issue in this case put the State in a position where nothing short of an entirely new trial at least on the issue of penalty must be had and this not until eight years after verdict.

IV.

THE DECISION SHOULD BE MADE PROSPECTIVE FOR ALL PERSONS OR, AT THE VERY LEAST, THE ISSUE SHOULD BE BRIEFED AND ARGUED. IF THE DECISION IS TO HAVE RETROACTIVE EFFECT, THIS COURT SHOULD HEAR ARGUMENT AND ESTABLISH A PROCEDURE FOR RESENTENCING OR RETRIAL.

The primary factors here are two. One, there has been great reliance on the part of prosecutors throughout the

nation on the propriety of the procedure used in this case. This reliance was based upon considerably more than the case of Logan v. United States, 144 U.S. 263 (1892). Several federal cases preceding and following Logan approved the procedure as well as the numerous state cases cited in Respondent Woods Brief at p. 8-13, n. 1.

Second, the impact of a retroactive holding is quite considerable. Hearings will be necessary in the case of every jury-sentenced defendant awaiting execution. Delay and crowded dockets will be inevitable and the problem will be aggravated in cases where the voir dire has not been transcribed. Neither Illinois nor most of the other states provide for separate penalty proceedings. And in Illinois as in most States the jury verdict is an essential prerequisite to sentence in a capital case. See Opinion of Mr. Justice Douglas, pp. 2-4. The net result is that, while this Court purports to challenge only sentence and not conviction, upon remand the only State procedure may be to provide an entirely new trial. Otherwise it may be argued that there is no procedure for passing of a valid sentence of any sort in the absence of a fresh jury verdict. Even if a prison sentence were possible without a new trial the State could not be reasonably expected to abandon its legitimate interest in attempting to secure the imposition of the death penalty. Further, the policy of state law in many instances is to deem verdict of guilty and punishment inseparable so that any error in respect to punishment proceeding will require a new trial.

Of course, the State's may argue in their own courts that where there is no legislative procedure for resentencing in capital cases then the court should develop rules for resentencing in the absence of statute. Presumably the States will ask for some form of judicial sentencing which petitioner so vigorously advocated. Yet even if the States

should win this argument, the decisions will create a flood of new litigation concerning *ex post facto* laws. And even a complete re-trial will give rise to claims of double jeopardy.

In the case of petitioner, the State will at least have the argument that he consistently sought judicial sentencing and that his motion might well be granted now. However in the State of Illinois and, we suspect, in the majority of other States, a retroactive holding will, at the least, create a new and endless flow of litigation and, at the most, result in new trials on stale evidence, if any, of what are collectively the worst and most dangerous men in this country.

Certainly, at least reargument is required to allow the parties to elucidate the consequences of a retroactive holding. No argument was addressed to this problem because it was not envisioned that this Court would adopt an opinion preserving the conviction and vacating the sentence.

Finally, in light of the retroactive holding, the Court should further decide the procedure to be followed on resentencing. Specifically the Court should decide whether it is possible for Illinois to resentence petitioner to death without granting a complete retrial. And, if this is possible, will a judicial resentencing or a resentencing before a second jury be objectionable on any constitutional grounds, in particular *ex post facto* grounds. The decision of the Court, as it now stands, is unfair to both the States and the defendants in cases where sentence of death has been imposed. The lack of clarity concerning resentencing, if not corrected, will cause needless confusion and cost to the States and needless anxiety to defendants in a class of cases where swift and certain proceedings are the only kind that satisfy the dictates of both justice and mercy.

Reargument to consider these issues should be granted.

V.

THE PRECISE SCOPE OF THE OPINION SHOULD BE CLARIFIED.

There is a fundamental difference between prosecution and defense counsel. A skilled, dutiful defense counsel will not hesitate to argue and advocate a legal theory helpful to his client no matter how often it is rejected. The ruling in Miranda v. Arizona, 384 U.S. 436, (1966) was handed down after similar arguments had failed for years. Prosecution counsel must abide by the decisions of higher courts or suffer almost certain reversal, a risk not often shared by defense counsel. Only rarely has the prosecution the opportunity to argue that a previous decision of constitutional dimensions be overruled.

Consequently it is, we think, incumbent upon the Court to be especially clear in ruling against commonly accepted prosecution practices. Mr. Justice Black characterizes the Opinion as a "thinly veiled warning to the States that they had better change their jury selection procedures" (p. 8). Whether this be true or not we can not say but we do say the prosecutors of this nation prefer their warnings to be unveiled and crystal clear. If the Court does not approve of the present jury selection procedure or the methods by which capital punishment is fixed, we would prefer a definite holding to that effect coupled with a ruling that the States will be given a certain period of time (e.g., two years to allow for those States in which Legislatures meet biennially) to adopt a satisfactory procedure. The mandate might follow the methods used in the constitutional landmark Brown v. Board of Education, 349 U.S. 294 (1955). This technique would clarify the questions of retroactivity and would give the States fair notice as to which of their procedures are in danger. It could be

said to this that the Court would then be intervening in the province of State Legislature but the plain fact is that the Court has intervened. What we ask now is the use of a better method of intervention.

CONCLUSION

The respondents respectfully request that the Court grant this Petition For Rehearing and affirm the judgment below. In the alternative, we ask the Court to change its mandate from "reversed" to "vacated and remanded." Further we ask the Court to make its ruling prospective for all cases and allow the States a reasonable time to change their procedures to comply with the Court's rulings.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....

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SUPREME COURT, U. S.

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Respondents.

(ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS)

PETITION FOR REHEARING BY THE PEOPLE OF THE STATE OF ILLINOIS

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(ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS)

PETITION FOR REHEARING BY THE PEOPLE OF THE STATE OF ILLINOIS

I.

THE COURT SHOULD CLARIFY ITS MANDATE SO THAT THERE IS NO DOUBT THAT FUTURE PROCEEDINGS CAN BE HELD.

The Court concluded its opinion in this case with the notation "Reversed". Such a mandate under Illinois law operates as a complete discharge, and additional proceed-

ings are precluded. The opinion however makes it clear that the conviction itself is not rendered invalid (Opinion, Fn. 21), and the Court apparently contemplated that some sort of resentencing procedures would follow.

The People of the State of Illinois would ask therefore that the mandate be changed to read "Reversed and Remanded", so that there is no doubt that future proceedings can be held.

II.

THE COURT SHOULD GRANT A REHEARING TO DETERMINE WHETHER THE DECISION SHOULD BE PROSPECTIVE ONLY.

As was previously noted, the Court sustained the petitioner's conviction but held that the punishment imposed was invalid. In a footnote (No. 22), the decision was made retroactive. It is fair to say that the petitioner, as well as the respondents, was surprised at the result. And well might the petitioner be surprised, since he made no claim in his petition for *certiorari* that the jury was biased on the question of punishment; since the grant of *certiorari* made no mention of jury bias on punishment; since petitioner's brief made no such argument; and since none of the oral argument as such was directed at whether or not the jurors were biased on the question of punishment. As a result the People had no opportunity or reason to anticipate the final decision and the reasons given for that decision. The People are aware that the Court's decisions come after serious deliberation and are not lightly put aside, but as a minimum the People should be allowed to argue that the decision should be prospective only.

At the present time there are approximately twenty-three convicted criminals under sentence of death in Illinois. As is apparent from the figures listed in Respondent Woods' Petition for Rehearing, Illinois prosecutors have requested the death penalty in only the most extreme cases, and accordingly only those who have committed the most heinous crimes are under death sentence. While the convictions of these criminals are still valid under the opinion herein, as a practical matter many of them will have to be tried anew. There has never been any provision in Illinois for separate penalty proceedings, and the Illinois Supreme Court has said in the past that express legislation would be required to establish such. [See *People v. Bernette,* 30 Ill. 2d 359, 197 N.E. 2d 436, 445 (1964)]. The holding of new trials will be a severe burden on Illinois since one trial alone—that of a prison inmate who killed a guard—recently cost the State close to one million dollars. A large portion of this cost was for defense attorneys' fees. [See *People ex rel. Conn.* v. *Randolph,* 35 Ill. 2d 24 (1966)]. In light of the unexpectedness of the decision herein, and in light of the many cases which had approved the practices which now have been condemned [*e.g., Logan* v. *United States,* 144 U.S. 263 (1892); *Turberville* v. *United States,* 303 F. 2d 411 (D.C. Cir. 1962), *cert. den.,* 370 U.S. 946 (1962)], the State of Illinois should be allowed to show the impact of retroactive application and to present arguments showing that the integrity of petitioner's trial was not undermined.

Furthermore, retroactive application of this opinion will not only impose a financial burden on Illinois, but will also result in a flood of new litigation. Some of those now condemned were sentenced to death by the jury alone, as was the practice in Illinois prior to 1962. Others were sentenced under the present statute, which provides that

the jury may recommend the death penalty but only the trial court can impose it. No matter what resentencing procedures are set up for those who will not be completely retried, whether it be by the Legislature or by the Illinois courts, there are sure to be claims in the future that an *ex post facto* law has been passed or that equal protection has been violated. The People should be allowed to show the impact on the administration of justice and to argue for only prospective operation of the rule announced.

CONCLUSION

The Respondent People of the State of Illinois respectfully ask that the Petition for Rehearing be granted and that the ruling be made prospective only. In the alternative, the People ask that the mandate be changed to read "Reversed and Remanded".

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

William G. Clark, Attorney General of the State of Illinois, Counsel for People of the State of Illinois.

SUPREME COURT OF THE UNITED STATES

No. 1015.—October Term, 1967.

William C. Witherspoon, Petitioner, v. State of Illinois et al. } On Writ of Certiorari to the Supreme Court of Illinois.

[June 3, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was brought to trial in 1960 in Cook County, Illinois, upon a charge of murder. The jury found him guilty and fixed his penalty at death. At the time of his trial an Illinois statute provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."[1]

Through this provision the State of Illinois armed the prosecution with unlimited challenges for cause in order to exclude those jurors who, in the words of the State's highest court, "might hesitate to return a verdict inflicting [death]."[2] At the petitioner's trial, the prosecu-

[1] Ill. Rev. Stat. 1959, c. 38, § 743. The section was re-enacted in 1961 but was not expressly repeated in the Code of Criminal Procedure of 1963. Ill. Rev. Stat. 1967, c. 38, § 115–4 (d) now provides only that "[e]ach party may challenge jurors for cause," but the Illinois Supreme Court has held that § 115–4 (d) incorporates former § 743. *People* v. *Hobbs*, 35 Ill. 2d 263, 274, 220 N. E. 2d 469, 475.

[2] "In the trial of the case where capital punishment may be inflicted a juror who has religious or conscientious scruples against capital punishment *might hesitate to return a verdict inflicting such punishment*, and in the present proceedings [a post-sentence sanity hearing] a juror having such scruples might likewise hesitate in

tion eliminated nearly half the venire of prospective jurors by challenging, under the authority of this statute, any venireman who expressed qualms about capital punishment. From those who remained were chosen the jurors who ultimately found the petitioner guilty and sentenced him to death. The Supreme Court of Illinois denied post-conviction relief,[3] and we granted certiorari[4] to decide whether the Constitution permits a State to execute a man pursuant to the verdict of a jury so composed.

I.

The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt.[5] Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death

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returning a verdict finding [the defendant] sane, which in effect confirms the death sentence." *People* v. *Carpenter*, 13 Ill. 2d 470, 476, 150 N. E. 2d 100, 103. (Emphasis added.)

[3] 36 Ill. 2d 471, 224 N. E. 2d 259.

[4] 389 U. S. 1035.

[5] Unlike the statutory provision in this case, statutes and rules disqualifying jurors with scruples against capital punishment are often couched in terms of reservations against finding a man *guilty* when the penalty might be death. See, *e. g.*, Cal. Penal Code, § 1074, subdivision 8. Yet, despite such language, courts in other States have sometimes permitted the exclusion for cause of jurors opposed to the death penalty even in the absence of a showing that their scruples would have interfered with their ability to determine guilt in accordance with the evidence and the law. See, *e. g.*, *State* v. *Thomas*, 78 Ariz. 52, 58, 275 P. 2d 408, 412; *People* v. *Nicolaus*, 65 Cal. 2d 866, 882, 423 P. 2d 787, 798; *Piccot* v. *State*, 116 So. 2d 626, 628 (Fla.); *Commonwealth* v. *Ladetto*, 349 Mass. 237, 246, 207 N. E. 2d 536, 542; *State* v. *Williams*, 50 Nev. 271, 278, 257 P. 619, 621; *Smith* v. *State*, 5 Okla. Crim. 282, 284, 114 P. 350, 351; *State* v. *Jensen*, 209 Ore. 239, 281, 296 P. 2d 618, 635; *State* v. *Leuch*, 198 Wash. 331, 333–337, 88 P. 2d 440, 441–442.

penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it.

In the present case the tone was set when the trial judge said early in the *voir dire*, "Let's get these conscientious objectors out of the way, without wasting any time on them." In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment.[6] Six said that they did not "believe in the death penalty" and were excused without any attempt to determine whether they could nonetheless return a verdict of death.[7] Thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having "conscientious or religious scruples against the infliction of the death penalty" or against its

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[6] The State stresses the fact that the judge who presided during the *voir dire* implied several times that only those jurors who could *never* agree to a verdict of death should deem themselves disqualified because of their scruples against capital punishment. The record shows, however, that the remarks relied upon by the State were not made within the hearing of every venireman ultimately excused for cause under the statute. On the contrary, three separate venires were called into the courtroom, and it appears that at least 30 of the 47 veniremen eliminated in this case were not even present when the statements in question were made.

[7] It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State. See *Commonwealth* v. *Webster*, 59 Mass. 295, 298. See also *Atkins* v. *State*, 16 Ark. 568, 580; *Williams* v. *State*, 32 Miss. 389, 395–396; *Rhea* v. *State*, 63 Neb. 461, 472–473, 88 N. W. 789, 792.

infliction "in a proper case" and were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.

Only one venireman who admitted to "a religious or conscientious scruple against the infliction of the death penalty in a proper case" was examined at any length. She was asked: "You don't believe in the death penalty?" She replied: "No. It's just I wouldn't want to be responsible." The judge admonished her not to forget her "duty as a citizen" and again asked her whether she had "a religious or conscientious scruple" against capital punishment. This time, she replied in the negative. Moments later, however, she repeated that she would not "like to be responsible for . . . deciding somebody should be put to death."[8] Evidently satisfied that this elaboration of the prospective juror's views disqualified her under the Illinois statute, the judge told her to "step aside."[9]

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[8] Compare *Smith* v. *State*, 55 Miss. 410, 413–414: "The declaration of the rejected jurors, in this case, amounted only to a statement that they would not like . . . a man to be hung. Few men would. Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man. . . . For the error in improperly rejecting [these] two members of the special *venire* the case must be reversed."

[9] As the *voir dire* examination of this venireman illustrates, it cannot be assumed that a juror who describes himself as having "conscientious or religious scruples" against the infliction of the death penalty or against its infliction "in a proper case" (see *People* v. *Bandhauer*, 66 Cal. 2d 524, 531, 426 P. 2d 900, 905) thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him. See also the *voir dire* in *Rhea* v. *State*, 63 Neb. 461, 466–468, 88 N. W. 789, 790. Cf. *State* v. *Williams*, 50 Nev. 271, 278, 257 P. 619, 621. Obviously many jurors "could, notwithstanding their conscientious scruples [against capital punishment], return . . . [a] verdict [of death] and . . . make their scruples subservient to their duty as jurors." *Stratton* v. *People*, 5 Col. 276, 277. Cf. *Commonwealth*

II.

The petitioner contends that a State cannot confer upon a jury selected in this manner the power to determine guilt. He maintains that such a jury, unlike one chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilt. To support this view, the petitioner refers to what he describes as "competent scientific evidence that death-qualified jurors are partial to the prosecution on the issue of guilt or innocence." [10]

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v. *Henderson*, 242 Pa. 372, 377, 89 A. 567, 569. Yet such jurors have frequently been deemed unfit to serve in a capital case. See, *e. g.*, *Rhea* v. *State*, *supra*, 63 Neb., at 470–471, 88 N. W., at 791–792. See generally, W. Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545, 547–548 (1961); Comment, 1968 Duke L. J. 283, 295–299.

The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors. Any "layman . . . [might] say he has scruples if he is somewhat unhappy about death sentences. . . . [Thus] a general question as to the presence of . . . reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." *Id.*, at 308–309. Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

[10] In his brief, the petitioner cites two surveys, one involving 187 college students, W. C. Wilson, Belief in Capital Punishment and Jury Performance (Unpublished Manuscript, University of Texas, 1964), and the other involving 200 college students, F. J. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases (Unpublished Manuscript, Morehouse

The data adduced by the petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt.[11] We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

College, undated). In his petition for certiorari, he cited a study based upon interviews with 1,248 jurors in New York and Chicago. A preliminary, unpublished summary of the results of that study stated that "a jury consisting only of jurors who have no scruples against the death penalty is likely to be more prosecution prone than a jury on which objectors to the death penalty sit," and that "the defendant's chances of acquittal are somewhat reduced if the objectors are excluded from the jury." H. Zeisel, Some Insights Into the Operation of Criminal Juries 42 (Confidential First Draft, University of Chicago, November 1957).

[11] During the post-conviction proceedings here under review, the petitioner's counsel argued that the prosecution-prone character of "death-qualified" juries presented "purely a legal question," the resolution of which required "no additional proof" beyond "the facts . . . disclosed by the transcript of the voir dire examination . . . ." Counsel sought an "opportunity to submit evidence" in support of several contentions unrelated to the issue involved here. On this issue, however, no similar request was made, and the studies relied upon by the petitioner in this Court were not mentioned. We can only speculate, therefore, as to the precise meaning of the terms used in those studies, the accuracy of the techniques employed, and the validity of the generalizations made. Under these circumstances, it is not surprising that the *amicus curiae* brief filed by the NAACP Legal Defense and Education Fund finds it necessary to observe that, with respect to bias in favor of the prosecution on the issue of guilt, the record in this case is "almost totally lacking in the sort of factual information that would assist the Court."

III.

It does not follow, however, that the petitioner is entitled to no relief. For in this case the jury was entrusted with two distinct responsibilities: first, to determine whether the petitioner was innocent or guilty; and second, if guilty, to determine whether his sentence should be imprisonment or death.[12] It has not been shown that this jury was biased with respect to the petitioner's guilt. But it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments. See *Glasser* v. *United States*, 315 U. S. 60, 84–86; *Irvin* v. *Dowd*, 366 U. S. 717, 722–723; *Turner* v. *Louisiana*, 379 U. S. 466, 471–473.

The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty. But in Illinois, as in other States,[13] the jury is given broad discretion to decide whether or not death *is* "the proper penalty" in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.

A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment

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[12] At the time of the petitioner's trial, the jury's penalty determination was binding upon the judge. Ill. Rev. Stat. 1959, c. 38, §§ 360, 801. That is no longer the case in Illinois, for the trial judge is now empowered to reject a jury recommendation of death, Ill. Rev. Stat. 1967, c. 38, § 1–7 (c) (1), but nothing in our decision turns upon whether the judge is bound to follow such a recommendation.

[13] See generally, H. Kalven and H. Zeisel, The American Jury 435, 444, 448–449 (1966).

entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, "free to select or reject as it [sees] fit," [14] a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.[15] Yet, in a nation less than half of whose people believe in the death penalty,[16] a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punish-

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[14] *People* v. *Bernette*, 30 Ill. 2d 359, 370, 197 N. E. 2d 436, 443.

[15] It is suggested in a dissenting opinion today that the State of Illinois might "impose a particular penalty, including death, on all persons convicted of certain crimes." *Post*, p. —. But Illinois has attempted no such thing. Nor has it defined a category of capital cases in which "death [is] the *preferred* penalty." *People* v. *Bernette*, *supra*, 30 Ill. 2d, at 369, 197 N. E. 2d, at 442. (Emphasis added.) Instead, it has deliberately "made . . . the death penalty . . . an optional form of punishment which [the jury remains] free to select or reject as it [sees] fit." 30 Ill. 2d, at 370, 197 N. E. 2d, at 443. And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (opinion of THE CHIEF JUSTICE, joined by MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and Mr. Justice Whittaker). Cf. n. 19, *infra*.

[16] It appears that, in 1966, approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. II, No. 3, at p. 84 (1967). In 1960, the comparable figures were 51% in favor, 36% opposed, and 13% undecided. *Ibid.*

ment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.[17]

If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty.[18] But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.[19]

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[17] Compare Arthur Koestler's observation:

"The division is not between rich and poor, highbrow and lowbrow, Christians and atheists: it is between those who have charity and those who have not. . . . The test of one's humanity is whether one is able to accept this fact—not as lip service, but with the shuddering recognition of a kinship: here but for the grace of God, drop I." Koestler, Reflections on Hanging 166–167 (1956).

[18] Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.

[19] The *amicus curiae* brief filed in this case by the American Friends Service Committee et al. notes that the number of persons under sentence of death in this country climbed from 300 at the end of 1963 to 406 at the end of 1966, while the number of persons actually executed fell from 21 in 1963 to 15 in 1964, seven in 1965, and one in 1966. The brief suggests that this phenomenon might

It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal "organized to convict." *Fay* v. *New York*, 332 U. S. 261, 294. See *Tumey* v. *Ohio*, 273 U. S. 510. It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.[20] Specifically,

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be explained in part by society's "deep reluctance actually to inflict the death sentence" and by a widening "divergence of belief between the juries we select and society generally."

[20] It should be understood that much more is involved here than a simple determination of sentence. For the State of Illinois empowered the jury in this case to answer "yes" or "no" to the question whether this defendant was fit to live. To be sure, such a determination is different in kind from a finding that the defendant committed a specified criminal offense. Insofar as a determination that a man should be put to death might require "that there be taken into account the circumstances of the offense together with the character and propensities of the offender," *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55, for example, it may be appropriate that certain rules of evidence with respect to penalty should differ from the corresponding evidentiary rules with respect to guilt. See, *e. g.*, *Williams* v. *New York*, 337 U. S. 241. But this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a prescribed course of conduct. See, *e. g.*, *Specht* v. *Patterson*, 386 U. S. 605. Cf. *Mempa* v. *Rhay*, 389 U. S. 128.

One of those requirements, at least, is that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death. It was in part upon such a premise that the Fourth Circuit recently invalidated a North Carolina murder conviction, noting that a juror who felt it his "duty" to sentence *every* convicted murderer to death was allowed to serve in that case, "while those who admitted to scruples against capital punishment were dismissed without further interrogation." This "double standard," the court concluded, "inevitably resulted in [a] denial of due process." *Crawford* v. *Bounds*, — F. 2d —, —.

we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[21] No defendant can constitutionally be put to death at the hands of a tribunal so selected.[22]

— (alternative holding). Cf. *Stroud* v. *United States*, 251 U. S. 15, 20–21; on petition for rehearing, *id.*, at 380, 381 (dictum).

[21] Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. See nn. 5 and 9, *supra*.

We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case.

[22] We have considered the suggestion, advanced in an *amicus curiae* brief filed by 24 States on behalf of Illinois, that we should

Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law.

Reversed.

"give prospective application only to any new constitutional ruling in this area," particularly since a dictum in an 1892 decision of this Court approved the practice of challenging for cause those jurors who expressed "conscientious scruples in regard to the infliction of the death penalty for crime." *Logan* v. *United States*, 144 U. S. 263, 298. But we think it clear, *Logan* notwithstanding, that the jury-selection standards employed here necessarily undermined "the very integrity of the . . . process" that decided the petitioner's fate, see *Linkletter* v. *Walker*, 381 U. S. 618, 639, and we have concluded that neither the reliance of law enforcement officials, cf. *Tehan* v. *Shott*, 382 U. S. 406, 417; *Johnson* v. *New Jersey*, 384 U. S. 719, 731, nor the impact of a retroactive holding on the administration of justice, cf. *Stovall* v. *Denno*, 388 U. S. 293, 300, warrants a decision against the fully retroactive application of the holding we announce today.

SUPREME COURT OF THE UNITED STATES

No. 1015.—October Term, 1967.

William C. Witherspoon, Petitioner, v. State of Illinois et al. } On Writ of Certiorari to the Supreme Court of Illinois.

[June 3, 1968.]

Mr. Justice Douglas.

My difficulty with the opinion of the Court is a narrow but important one. The Court permits a State to eliminate from juries some of those who have conscientious scruples against the death penalty; but it allows those to serve who have no scruples against it as well as those who, having such scruples, nevertheless are deemed able to determine after a finding of guilt whether the death penalty or a lesser penalty should be imposed. I fail to see or understand the constitutional dimensions of those distinctions.

The constitutional question is whether the jury must be "impartially drawn from a cross-section of the community," or whether it can be drawn with systematic and intentional exclusion of some qualified groups, to use Mr. Justice Murphy's words in his dissent in *Fay* v. *New York*, 332 U. S. 261, 296.

Fay v. *New York*, which involved a conviction of union leaders for extortion, was the "blue ribbon" jury case in which the jury was weighted in favor of propertied people more likely to convict of certain kinds of crimes. The decision was 5–4, Mr. Justice Murphy speaking for Mr. Justice Black, Mr. Justice Rutledge, and myself:

> "There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely

> from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people." *Id.*, at 300.

The idea that a jury should be "impartially drawn from a cross-section of the community" [1] certainly should not mean a selection of only those with a predisposition to impose the severest sentence or with a predisposition to impose the least one that is possible.

The problem is presented in different postures under several types of state laws. Many States, including Illinois, specifically grant the jury discretion as to penalty; [2]

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[1] "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas*, 311 U. S. 128, 130. And see *Ballard* v. *United States*, 329 U. S. 187, 191; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community"); *Glasser* v. *United States*, 315 U. S. 60, 85–86.

[2] Ala. Code, Tit. 14, § 318 (1959); Ariz. Rev. Stat. Ann. § 13–453 (1956); Colo. Rev. Stat. Ann. § 40–2–3 (1964); Haw. Rev. Laws § 291–5 (1955); Idaho Code Ann. § 18–4004 (1948); Ill. Ann. Stat., c. 38, § 1–7 (c)(1) (1966 Supp.); Ind. Ann. Stat. § 9–1819 (1956); Kan. Stat. Ann. § 21–403 (1964); Ky. Rev. Stat. § 435.010 (1962), Ky. Rule Crim. Proc. 9.84 (1963); Mo. Rev. Stat. § 559.030 (1953); Neb. Rev. Stat. § 28–401 (1965); Nev. Rev. Stat. § 200.030 (1963); Okla. Stat. Ann., Tit. 21, § 707 (1958); Tenn. Code Ann § 39–2406

in some, this discretion is exercised at a special penalty trial, convened after a verdict of guilt has been returned.[3] In other States, death is imposed upon a conviction of first degree murder unless the jury recommends mercy or life imprisonment,[4] although in these States the jury is allowed to find a lesser degree of murder (or to find manslaughter, if under state law there are no degrees of murder), if the evidence will permit, without regard to the formal charge.[5] In some States, the death penalty is

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(1955); Tex. Pen. Code Ann., Art. 1257 (1961, Tex. Code Crim. Proc., Art. 37-07 (1967 Supp.); Va. Code Ann. §§ 18.1-22, 19.1-291 (1960). In most of these States, a jury decision of death is binding on the court. In a few States, however, the judge may overrule the jury and impose a life sentence. Ill. Ann. Stat., c. 38, § 1-7 (c)(1) (1966 Supp.); *State* v. *Anderson*, 384 S. W. 2d 591 (1965); S. D. Code § 13.2012 (1960 Supp.).

[3] Cal. Pen. Code § 190.1 (West 1967 Supp.); N. Y. Pen. Code §§ 125.30, 125.35 (McKinney 1967); Pa. Stat., Tit. 18, § 4701 (1963). And see S. D. Code § 13.2012 (1960 Supp.) (trial court may ask jury to retire to deliberate on penalty after verdict of guilt returned).

[4] Ark. Stat. Ann. §§ 41-2227, 43-2153 (1964); Conn. Gen. Stat. Rev. § 53-10 (1965 Supp.); Del. Code Ann., Tit. 11, §§ 571, 3901 (1966 Supp.); Fla. Stat. §§ 782.04, 919.23 (1965); Ga. Code Ann. § 26.1005 (1953); La. Rev. Stat. § 14-30 (1951); Md. Ann. Code, Art. 27, § 413 (1967); Mass. Gen. Laws Ann., c. 265, § 2 (1959); Miss. Code Ann. § 2217 (1957); Mont. Rev. Code Ann. § 94.2505 (1949); N. J. Rev. Stat. § 2A:113-4 (1953); N. M. Stat. Ann. § 41-2410 (1942); N. C. Gen. Stat. § 14-17 (1953); Ohio Rev. Code Ann. § 2901.01 (1954); S. C. Code Ann. § 16-52 (1952); Utah Code Ann. § 76-30-4 (1953); Wyo. Stat. Ann. § 6-54 (1959). In two of these States, the court possesses discretion to impose a life sentence despite the failure of the jury to recommend mercy. Ga. Code Ann. § 26.1005 (1953) (if conviction based solely on circumstantial evidence); Md. Ann. Code, Art. 27, § 413 (1967). In Delaware and Utah the court may overrule a jury recommendation of life imprisonment and impose the death penalty. Del. Code Ann., Tit. 11, §§ 571, 3901 (1966 Supp.); Utah Code Ann. § 76-30-4 (1953), *State* v. *Romeo*, 42 Utah 46, 128 P. 530 (1912).

[5] Arkansas: Ark. Stat. Ann. § 43-2152 (1964); Connecticut: Conn. Gen. Stat. Rev. § 53-9 (1965 Supp.); Delaware: *State* v. *Price*, 30

mandatory for certain types of crimes.[6] In still others, it has been abolished either in whole or in part.[7] And a few States have special rules which do not fit precisely into the above categories.[8]

Del. 544, 108 A. 385 (1919); Florida: *Brown* v. *State*, 124 So. 2d 481 (1961); Georgia: (no degrees of murder), *Graham* v. *State*, 34 Ga. 598, 130 S. E. 354 (1925); Louisiana: (no degrees of murder) *State* v. *Goodwin*, 189 La. 443, 179 So. 591 (1938); Maryland: Md. Ann. Code, Art. 27, § 412 (1967), and see *Chisley* v. *State*, 202 Md. 87, 95 A. 2d 577 (1953), *Gunther* v. *State*, 228 Md. 404, 179 A. 2d 880 (1962); Massachusetts: *Commonwealth* v. *Kavalauskas*, 317 Mass. 453, 58 N. E. 2d 819 (1945), *Commonwealth* v. *Di Stasio*, 298 Mass. 562, 11 N. E. 2d 799 (1938); Mississippi: (no degrees of murder) *Anderson* v. *State*, 199 Miss. 885, 25 So. 2d 474 (1946); Montana: *State* v. *Le Duc*, 89 Mont. 545, 300 P. 919 (1931), *State* v. *Miller*, 91 Mont. 596, 9 P. 2d 474 (1932); New Jersey: *State* v. *Sullivan*, 43 N. J. 209, 203 A. 2d 177 (1964), *State* v. *Wynn*, 21 N. J. 264, 121 A. 2d 534 (1956); New Mexico: *State* v. *Smith*, 26 N. M. 482, 194 P. 869 (1921); North Carolina: *State* v. *Lucas*, 124 N. C. 825, 32 S. E. 962 (1899); Ohio: *State* v. *Muskus*, 109 N. E. 2d 15 (1952); South Carolina: (no degrees of murder) *State* v. *Byrd*, 72 S. C. 104, 51 S. E. 542 (1904); Utah: *State* v. *Mewhinney*, 43 Utah 135, 134 P. 632 (1916); Wyoming: *Brantly* v. *State*, 9 Wyo. 102, 61 P. 139 (1900).

[6] Ala. Code, Tit. 14, § 319 (1959) (person serving life term at time of commission of offense); Ariz. Rev. Stat. Ann. § 13–701 (1956) (treason); Mass. Gen. Laws Ann., c. 265, § 2 (1959) (rape murders); Miss. Code Ann. § 2397 (1957) (treason); Ohio Rev. Code Ann. §§ 2901.09, 2901.10 (1954) (murder of President, Vice-President, Governor, or Lieutenant Governor); R. I. Gen. Laws Ann. § 11–23–2 (1957) (person serving life term at time of commission of offense).

[7] Alaska Stat. Ann. § 11.15.010 (1962); Iowa Code Ann., Tit. 35, § 690.2 (1967 Supp.); Me. Rev. Stat., c. 130, § 1 (1965); Mich. Stat. Ann. § 28.548 (1954); Minn. Stat. § 609.185 (1964); Ore. Rev. Stat. § 163.010 (1967); W. Va. Code Ann. § 61–2–2 (1966); Wis. Stat. Ann. § 940.01 (1958). In North Dakota the death penalty has been abolished except in the case of murder committed while under a life sentence for murder, in which case the death penalty may be imposed at the jury's discretion. N. D. Rev. Code §§ 12–

[*Footnote 8 on page 5*]

A fair cross-section of the community may produce a jury almost certain to impose the death penalty if guilt were found; or it may produce a jury almost certain not to impose it. The conscience of the community is subject to many variables, one of which is the attitude toward the death sentence. If a particular community were overwhelmingly opposed to capital punishment, it would not be able to exercise a discretion to impose or not impose the death sentence. A jury representing the conscience of that community would do one of several things depending on the type of state law governing it: it would avoid the death penalty by recommending mercy or it would avoid it by finding guilt of a lesser offense.

In such instance, why should not an accused have the benefit of that controlling principle of mercy in the community? Why should his fate be entrusted exclusively

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27–13, 12–27–22 (1960). Vermont has also abolished the death penalty except in the cases of an unrelated second offense of murder or the killing of a peace officer or prison official, in which cases the death penalty may be imposed at the jury's discretion. Vt. Rev. Stat., Tit. 13, § 2303 (1967 Supp.). In Rhode Island the death penalty has been abolished except that it is mandatory in cases of murder committed while under a life sentence for murder. R. I. Gen. Laws Ann. § 11–23–2 (1957). In Georgia the death penalty may not be imposed if the person convicted was under 17 years of age at the time of the offense. Ga. Code Ann. § 26.1005 (1967 Supp.). In California it may not be imposed if the person was under 18 years of age. Cal. Pen. Code § 190.1 (West 1967 Supp.). In New York capital punishment has been abolished except that it may be imposed at the jury's discretion in cases of the murder of a peace officer while in the course of performing his official duties or of murder committed while under a life sentence for murder. N. Y. Pen. Code § 125.30 (McKinney 1967).

[8] New Hampshire and Washington provide for life imprisonment unless the jury recommends death. N. H. Rev. Stat. Ann. § 585:4 (1955); Wash. Rev. Code § 9.48.030 (1956). Maryland permits the trial court alone to decide the penalty in its discretion without submitting the matter to the jury in cases of rape and aggravated kidnaping. Md. Ann. Code, Arts. 27–461, 27–338 (1967).

to a jury that was either enthusiastic about capital punishment or so undecided that it could exercise a discretion to impose it or not, depending on how it felt about the particular case?

I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of juries who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.

The Court in *Logan* v. *United States*, 144 U. S. 263, 298, held that prospective jurors who had conscientious scruples concerning infliction of the death penalty were rightly challenged by the prosecution for cause, stating that such jurors would be prevented "from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence. . . ." That was a federal prosecution, the requirement being "an impartial jury" as provided in the Sixth Amendment, a requirement now applicable to the States by reason of the incorporation of the Jury Clause of the Sixth Amendment into the Due Process Clause of the Fourteenth. *Duncan* v. *Louisiana*, 390 U. S. —.

But where a State leaves the fixing of the penalty to the jury, or provides for a lesser penalty on recommendation of mercy by the jury, or gives the jury power to find guilt in a lesser degree, the law leaves the jury great leeway. Those with scruples against capital punishment can try the case "according to the law and the evidence," because the law does not contain the inexorable command of "an eye for an eye." Rather "the law" leaves the degree of punishment to the jury. *Logan* v. *United*

States in the setting of the present case [9] does not state what I believe is the proper rule. Whether in other circumstances it states a defensible rule is a question we need not reach. Where the jury has the discretion to impose the death penalty or not to impose it, the *Logan* rule is, in my opinion, an improper one. For it results in weeding out those members of the community most likely to recommend mercy and to leave in those most likely not to recommend mercy.[10]

Challenges for cause and peremptory challenges do not conflict with the constitutional right of the accused to trial by an "impartial jury." No one is guaranteed a partial jury. Such challenges generally are highly individualized not resulting in depriving the trial of an entire class or of various shades of community opinion or of the "subtle interplay of influence" of one juror on another.

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[9] The ruling on the "impartial jury" in *Logan* v. *United States*, seems erroneous on the facts and the applicable law of that case. The governing statute (a Texas statute), 144 U. S., at 264, n. 1, left to the jury "the degree of murder, as well as the punishment."

[10] ". . . the gulf between the community and the death-qualified jury grows as the populace becomes the more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death verdict becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, *to be sworn as a juror in a capital case*—wanes in a particular community, the prejudicial effect of the death-qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication to human charity and understanding. The due-process implications of this flux seem obvious. Yesterday's practice becomes less and less relevant to today's problem."

Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt? 39 Tex. L. Rev. 545, 556–557 (1961).

Ballard v. *United States*, 329 U. S. 187, 193. In the present case, however, where the jury is given discretion in fixing punishment,[11] the wholesale exclusion of a class that makes up a substantial portion of the population [12] produces an unrepresentative jury.[13]

Although the Court reverses as to penalty, it declines to reverse the verdict of guilt rendered by the same jury. It does so on the ground that petitioner has not demonstrated on this record that the jury which convicted him was "less than neutral with respect to guilt," *ante*, at —, n. 18, because of the exclusion of all those opposed in some degree to capital punishment. The Court fails to find on this record "an unrepresentative jury on the issue of guilt." *Ante*, at —. But we do not require a showing of specific prejudice when a defendant has been deprived of his right to a jury representing a cross-section

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[11] In the words of the Illinois Supreme Court, the death penalty is "an optional form of punishment which [the jury is] free to select or reject as it [sees] fit." *People* v. *Bernette*, 30 Ill. 2d 349, 370 — N. E. 2d —, — (1964). See also *People* v. *Dukes*, 12 Ill. 2d 334, 146 N. E. 2d 14 (1958); *People* v. *Weisberg*, 396 Ill. 412, 71 N. E. 2d 671 (1947); *People* v. *Martellaro*, 281 Ill. 300, 117 N. E. 1052 (1918).

[12] As the Court points out, a substantial number of the veniremen (47 out of 95), whom we may assume represented a fair cross-section of the community, were excluded because of their opposition to the death penalty.

[13] In *Rudolph* v. *Alabama*, 375 U. S. 889, I joined the opinion of Mr. Justice Goldberg, dissenting from the Court's denial of certiorari, who expressed the view that this Court should consider the question whether the Eighth Amendment prohibits "the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life." *Ibid.* In contrast, the instant case concerns a convicted murderer who has been sentenced to death for his crime. The requirement imposed by the Sixth and the Fourteenth Amendments that a jury be representative of a cross-section of the community is, of course, separate and distinct from the question whether the death penalty offends the Eighth Amendment.

of the community. See *Ballard* v. *United States,* 329 U. S. 187, 195; *Ware* v. *United States,* 356 F. 2d 787 (C. A. D. C. Cir. 1965). We can as easily assume that the absence of those opposed to capital punishment would rob the jury of certain peculiar qualities of human nature as would the exclusion of women from juries. *Ballard* v. *United States,* 329 U. S., at 193–194. I would not require a specific showing of a likelihood of prejudice, for I feel that we must proceed on the assumption that in many, if not most, cases of class exclusion on the basis of beliefs or attitudes some prejudice does result and many times will not be subject to precise measurement. Indeed, that prejudice "is so subtle, so intangible, that it escapes the ordinary methods of proof." *Fay* v. *New York,* 332 U. S., at 300 (dissenting opinion). In my view, that is the essence of the requirement that a jury be drawn from a cross-section of the community.

SUPREME COURT OF THE UNITED STATES

No. 1015.—October Term, 1967.

William C. Witherspoon, Petitioner, *v.* State of Illinois et al. | On Writ of Certiorari to the Supreme Court of Illinois.

[June 3, 1968.]

Mr. Justice Black, with whom Mr. Justice Harlan and Mr. Justice White join, dissenting.

The Court closes its reversal of this murder case with the following graphic paragraph:

> "Whatever else might be said of capital punishment it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law."

I think this charge against the Illinois courts is completely without support in the record. The opinion affirming this conviction for a unanimous Illinois Supreme Court was written by Justice Walter Schaefer, a judge nationally recognized as a protector of the constitutional rights of defendants charged with crime. It seems particularly unfortunate to me that this Court feels called upon to charge that Justice Schaefer and his associates would let a man go to his death after the trial court had contrived a "hanging jury" and, in this Court's language, "stacked the deck" to bring about the death sentence for petitioner. With all due deference it seems to me that one might much more appropriately charge that this Court has today written the law in such a way that the States are being forced to try their murder cases with biased juries. If this Court is to hold capital

punishment unconstitutional, I think it should do so forthrightly, not by making it impossible for States to get juries that will enforce the death penalty.

Now to the case.

On April 29, 1959, *more than nine years ago*, petitioner shot and killed a policeman in order to escape arrest. Petitioner had been struggling with a woman on the street whom he had met in a tavern when a police patrol car assigned to the vicinity stopped at a nearby traffic light. The woman was able to free herself from petitioner's grasp and rushed to the patrol car where she told the two policemen in it that petitioner was carrying a gun. Petitioner overheard this conversation and fled to a nearby parking lot and hid in one of the many parked trailers and tractors. It was while one of the policemen was searching this trailer that petitioner shot him. There is no doubt that petitioner killed the policeman since the dying officer himself identified petitioner at the hospital, and petitioner later lectured the police on using such young and inexperienced officers. And as I read the majority opinion, even they are unwilling to cast any doubt on petitioner's conviction. See n. 21, majority opinion.

At his trial for murder petitioner was represented by three appointed counsel, the chief of whom was the then Chairman of the Chicago Bar Association Committee for the Defense of the Indigent. It is important to note that when those persons who acknowledged having "conscientious or religious scruples against the infliction of the death penalty" were excluded from the jury, defense counsel made no attempt to show that they were nonetheless competent jurors. In fact, when the jurors finally were accepted by defense counsel, the defense still had three peremptory challenges left to exercise. In the past this has frequently been taken as an indication that the jurors who were impaneled were impartial. See cases collected in *United States* v. *Puff*, 211 F. 2d 171, 185

(C. A. 2d Cir. 1954). And it certainly amounts to a clear showing that in this case petitioner's able and distinguished counsel did not believe petitioner was being tried by a biased, much less a "hanging" jury.

After petitioner' conviction, another very distinguished attorney was appointed to prosecute his appeal, and an extensive brief alleging some 15 separate trial errors was filed in the Supreme Court of Illinois. Again, however, there was no indication that anyone thought petitioner had been convicted by a biased jury. On March 25, 1963, the Supreme Court of Illinois affirmed petitioner's conviction in a lengthy opinion. *People* v. *Witherspoon*, 27 Ill. 2d 483, 190 N. E. 2d 281. Petitioner attacked his conviction by pursuing both habeas corpus relief and the statutory post-conviction remedy. Again no mention was made of any alleged bias in the jury. When the Supreme Court of Illinois on January 17, 1964, refused the requested relief, petitioner sought federal habeas corpus, and was assisted by a third court-appointed attorney. As in his previous attacks no claim was made that petitioner was denied an impartial jury. Petitioner was unsuccessful in this federal habeas corpus bid, *Witherspoon* v. *Ogilvie*, 337 F. 2d 427 (C. A. 7th Cir. 1964), and we denied certiorari. *Witherspoon* v. *Ogilvie*, 379 U. S. 950. Then in February 1965, petitioner filed a petition in the state courts requesting whatever form of remedy is "provided for by Illinois law." Among other claims, now appeared the contention that petitioner's constitutional rights were violated when the trial court excused for cause prospective jurors having scruples against capital punishment. The state trial judge dismissed the petition on the ground that it failed to set forth facts sufficient to entitle the petitioner to relief. Petitioner then appealed to the Illinois Supreme Court where he was appearing for the third time in this case and where, more than six years after his trial, he argued that the disqualification for cause of jurors having

conscientious or religious scruples against capital punishment was unconstitutional.* That court disallowed petitioner's claim concluding that "we adhere to the system in which each side is allowed to examine jurors and eliminate those who can not be impartial." 36 Ill. 2d, at 476; 224 N. E. 2d, at 262. This Court subsequently granted certiorari to review the decision of the Illinois Supreme Court.

At the time of petitioner's trial, § 743 of the Illinois Criminal Code provided:

> "In trials for murder it shall be a cause for challenge of any juror, who shall on being examined state that he has conscientious scruples against capital punishment or that he is opposed to the same."

The obvious purpose of this section is to insure, as well as laws can insure such a thing, that there be an impartial jury in cases in Illinois where the death sentence may be imposed. And this statute recognizes that the people as a whole, or as they are usually called, "society" or "the state," have as much right to an impartial jury as do criminal defendants. This Court itself has made that quite clear:

> "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes* v. *Missouri*, 120 U. S. 68, 70. See also *Swain* v. *Alabama*, 380 U. S. 202, 219–220.

As I see the issue in this case, it is a question of plain bias. A person who has conscientious or religious scru-

*Certainly long delays in raising objections to trial proceedings should not be condoned except to prevent intolerable miscarriages of justice. Cf. *Fay* v. *Noia*, 372 U. S. 391.

ples against capital punishment will seldom if ever vote to impose the death penalty. This is just human nature, and no amount of semantic camouflage can cover it up. In the same manner, I would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against not inflicting the death sentence on any person convicted of murder (a juror who claims, for example, that he adheres literally to the Biblical admonition of "an eye for an eye"). Yet the logical result of the majority's holding is that such persons must be allowed so that the "conscience of the community" will be fully represented when it decides "the ultimate question of life or death." While I have always advocated that the jury be as fully representative of the community as possible, I would never carry this so far as to require that those biased against one of the critical issues in a trial should be represented on a jury. I still subscribe to the words of this Court written over 75 years ago in *Logan* v. *United States*, 144 U. S. 263, 298:

> "As the defendants were indicted and to be tried for a crime punishable by death, those jurors who stated on *voir dire* that they had 'conscientious scruples in regard to the infliction of the death penalty for crime' were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and evidence, is not an impartial juror. This Court has accordingly held that a person who has a conscientious belief that polygamy is rightful may be challenged for cause in a trial for polygamy. *Reynolds* v. *United States*, 98 U. S. 145, 147, *Miles* v. *United States*, 103 U. S. 304, 310. And the principle has been applied to

the very question now before us by Mr. Justice Story in *United States* v. *Cornell*, 2 Mason 91, 105, and by Mr. Justice Baldwin in *United States* v. *Wilson*, Baldwin, 78, 83, as well as by the courts of every state in which the question has arisen, and by express statute in many states. Wharton Crim. Pl. (9th ed.) § 604."

The majority opinion attempts to equate those who have conscientious or religious scruples against the death penalty with those who do not in such a way as to balance the allegedly conflicting viewpoints in order that a truly representative jury can be established to exercise the community's discretion in deciding on punishment. But for this purpose I do not believe that those who have conscientious or religious scruples against the death penalty and those who have nd feelings either way are in any sense comparable. Scruples against the death penalty are commonly the result of a deep religious conviction or a profound philosophical commitment developed after much soul searching. The holders of such scruples must necessarily recoil from the prospect of making possible what they regard as immoral. On the other hand, I cannot accept the proposition that persons who do not have conscientious scruples against the death penalty are "prosecution prone." * With regard to this group, I would agree with the following statement of the Court of Appeals for the District of Columbia:

"No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are as bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case. Being not op-

*See *Bumper* v. *North Carolina*, — U. S. —, ——— (dissenting opinion).

posed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters; but that extreme is not indicated by mere lack of opposition to capital punishment. The two antipathies can readily coexist; contrariwise either can exist without the other; and indeed, neither may exist in a person. It seems clear enough to us that a person or a group of persons may not be opposed to capital punishment and at the same time may have no particular bias against any one criminal or, indeed, against criminals as a class; people, it seems to us, may be completely without a controlling conviction one way or the other on either subject. . . ." *Tuberville* v. *United States*, 303 F. 2d 411, 420–421 (C. A. D. C. Cir. 1962), cert. denied, 370 U. S. 946.

It seems to me that the Court's opinion today must be read as holding just the opposite from what has been stated above. For no matter how the Court might try to hide it, the implication is inevitably in its opinion that people who do not have conscientious scruples against the death penalty are somehow callous to suffering and are, as some of the commentators cited by the Court called them, "prosecution prone." This conclusion represents a psychological foray into the human mind that I have considerable doubt about my ability to make, and I must confess that the two or three so-called "studies" cited by the Court on this subject are not persuasive to me.

Finally, I want to point out that the *real* holding in this case is, at least to me, very ambiguous. If we are to take the opinion literally, then I submit the Court today has decided nothing of substance, but has merely indulged itself in a semantic exercise. For as I read the

opinion, the new requirement placed upon the States is that they cease asking prospective jurors whether they have "conscientious or religious scruples against the infliction of the death penalty," but instead ask whether "they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." (See majority opinion, n. 21.) I believe that this fine line the Court attempts to draw is based on a semantic illusion and that the practical effect of the Court's new formulation of the question to be asked state juries will not produce a significantly different kind of jury from the one chosen in this case. And I might add that the States will have been put to a great deal of trouble for nothing. Yet, as I stated above, it is not clear that this is all the Court is holding. For the majority opinion goes out of its way to state that in some future case a defendant might well establish that a jury selected in the way the Illinois statute here provides is "less than neutral with respect to *guilt*." (Majority opinion, n. 18.) This seems to me to be but a thinly veiled warning to the States that they had better change their jury selection procedures or face a decision by this Court that their murder convictions have been obtained unconstitutionally.

I believe that the Court's decision today goes a long way in destroying the concept of an impartial jury as we have known it. This concept has been described most eloquently by Justice Story:

> "To insist on a juror's sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudice, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt,

> the proceedings of courts of justice. We do not sit here to produce the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice [which is required]." *United States* v. *Cornell*, 25 Fed. Cas. 650, 655–656 (1820).

It is just as necessary today that juries be impartial as it was in 1820 when Justice Story made this statement. I shall not contribute in any way to the destruction of our ancient judicial and constitutional concept of trial by an impartial jury by forcing the States through "constitutional doctrine" laid down by this Court to accept jurors who are bound to be biased. For this reason I dissent.

SUPREME COURT OF THE UNITED STATES

No. 1015.—October Term, 1967.

William C. Witherspoon, Petitioner, *v.* State of Illinois et al.	On Writ of Certiorari to the Supreme Court of Illinois.

[June 3, 1968.]

Mr. Justice White, dissenting.

The Court does not hold that imposition of the death penalty offends the Eighth Amendment. Nor does it hold that a State Legislature may not specify only death as the punishment for certain crimes, so that the penalty is imposed automatically upon a finding of guilt, with no discretion in judge or jury. Either of these holdings might furnish a satisfactory predicate for reversing this judgment. Without them, the analytic basis of the result reached by the Court is infirm; the conclusion is reached because the Court says so, not because of reasons set forth in the opinion.

The Court merely asserts that this legislative attempt to impose the death penalty on some persons convicted of murder, but not on everyone so convicted, is constitutionally unsatisfactory:

> "It is, of course, settled that a State may not entrust the determination of guilt to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Ante*, p. —. (Emphasis added.) (Citations and footnote omitted.)

The sole reason connecting the two sentences is the raw assertion that the situations are closely related. Yet

the Constitution, which bars a legislative determination that everyone indicted should be convicted, and so requires the judgment of a guilt-determining body unprejudiced as to the result,[1] speaks in entirely different terms to the determination of sentence, even when that sentence is death. The Court does not deny that the legislature can impose a particular penalty, including death, on all persons convicted of certain crimes. Why, then, should it be disabled from delegating the penalty decision to a group who will impose the death penalty more often than would a group differently chosen?

All Illinois citizens, including those who oppose the death penalty, are assured by the Constitution a fair opportunity to influence the Legislature's determinations about criminal sentences. *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and succeeding cases. Those opposing the death penalty have not prevailed in that forum, however. The representatives of the people of Illinois have determined that the death penalty decision should be made in individual cases by a group of those citizens without conscientious scruples about one of the sentencing alternatives provided by the Legislature. This method of implementing the majority's will was presumably related to a desire to preserve the traditional policy of requiring that jury verdicts be unanimous. The Legislature undoubtedly felt that if all citizens could serve on the jury, and if one citizen with especially pronounced "scruples" could prevent a decision to impose death, the penalty would almost never be imposed.[2] We need not

[1] While I agree generally with the opinion of MR. JUSTICE BLACK, and so have joined it, I would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt.

[2] The States should be aware of the ease with which they can adjust to today's decision. They continue to be permitted to impose

decide today whether any possible delegation of the sentencing decision, for example a delegation to the surviving relatives of the victim, would be constitutionally impermissible because it would offend the conscience of civilized men, *Rochin* v. *California*, 342 U. S. 165, 172 (1951). The delegation by Illinois, which merely excludes those with doubts in policy about one of the punishments among which the Legislature sought to have them choose, seems an entirely reasonable and sensible legislative act.

The Court may have a strong dislike for this particular sentence, and it may desire to meet Mr. Koestler's standards of charity. Those are laudable motives, but hardly a substitute for the usual processes of reasoned analysis. If the Court can offer no better constitutional grounds for today's decision than those provided in the opinion, it should restrain its dislike for the death penalty and leave the decision about appropriate penalties to branches of government whose members, selected by popular vote, have an authority not extended to this Court.

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the penalty of death on all who commit a particular crime. And replacing the requirement of unanimous jury verdicts with majority decisions about sentence should achieve roughly the same result reached by the Illinois Legislature through the procedure struck down today.